Supreme Court, U.S.
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Supreme Court of the United States

CARL MELVIN TOWNES,

Petitioner,

v.

LARRY W. JARVIS, Warden;
GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the holding of *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), which clarified the pleading requirements for intentional discrimination cases, still good law after this Court's decision in *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937?

PARTIES TO THE PROCEEDINGS

Petitioner is Carl Melvin Townes, petitioner below.

Respondents are Larry W. Jarvis, Warden of the Bland Correctional Center, the correctional facility at which Mr. Townes was imprisoned; and Gene M. Johnson, the Director of the Virginia Department of Corrections; both of whom were respondents below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	1
INTRODUCTION	3
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE PETITION	11
I. There Is A Deep And Mature Circuit Split On The Pleading Standard Applicable To Intentional Discrimination Claims.	11
A. This Court Has Issued Several Recent Decisions Concerning Pleading Requirements	12

Contents

Page

B. There Is Disagreement Among The Circuits On Whether *Swierkiewicz* Remains Good Law. 16

II. This Case Presents An Ideal Vehicle For Review Of These Issues. 24

CONCLUSION 26

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Filed August 19, 2009 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The Eastern District Of Virginia Filed August 22, 2005 ..... 33a

Appendix C — Parole Board Opinion Dated August 7, 2003 ..... 48a

Appendix D — State Supreme Court Opinion Dated November 5, 2003 ..... 49a

TABLE OF CITED AUTHORITIES

Page

CASES

Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8 (D.C. Cir. 2008) 4, 19-20

Al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009) 15, 20

Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937 (2009) ..... *passim*

Ballard v. Estelle, 937 F.2d 453 (9th Cir. 1991) 11

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) ..... *passim*

Boykin v. KeyCorp, 521 F.3d 202 (2d Cir. 2008) ..... *passim*

Brown v. Budz, 398 F.3d 904 (7th Cir. 2005) 5, 21

Burkey v. Marberry, 556 F.3d 142 (3d Cir.), *cert. denied*, 130 S. Ct. 458 (2009) 25

Conley v. Gibson, 355 U.S. 41 (1957) 13

Cited Authorities

Page

Cummings v. Sirmons,
506 F.3d 1211 (10th Cir. 2007) 10

Douglas v. Buder,
412 U.S. 430 (1973) (per curiam) 10

Erickson v. Pardus,
551 U.S. 89 (2007) (per curiam) 4, 14, 21, 23

Fowler v. UPMC Shadyside,
578 F.3d 203 (3d Cir. 2009) 4, 18

Jordan v. Alternative Resources Corp.,
458 F.3d 332 (4th Cir. 2006), *reh'g en banc denied*, 467 F.3d 378, *cert. denied*, 127 S. Ct. 2036 (2007) 17

Kwai Fun Wong v. United States,
373 F.3d 952 (9th Cir. 2004) 22

Levine v. Apker,
455 F.3d 71 (2d Cir. 2006) 25

Lindsay v. Yates,
498 F.3d 434 (6th Cir. 2007) 4, 19

Mack v. Caspari,
92 F.3d 637 (8th Cir. 1996) 11

Mujahid v. Daniels,
413 F.3d 991 (9th Cir. 2005) 25

Cited Authorities

Page

Pacheco v. Lappin,
167 F. App'x 562 (7th Cir. Feb. 1, 2006) 22

Perry v. Oltmans,
106 F. App'x 476 (7th Cir. July 15, 2004) 22

Richmond v. Lewis,
506 U.S. 40 (1992) 10

Ruffin v. Nicely,
183 F. App'x 505 (6th Cir. May 18, 2006) 4, 19

Sanna v. Dipaolo,
265 F.3d 1 (1st Cir. 2001) 10

Smith v. City of Salem,
378 F.3d 566 (6th Cir. 2004) 22

Smith v. Horn,
120 F.3d 400 (3d Cir. 1997) 11

Swierkiewicz v. Sorema N. A.,
534 U.S. 506 (2002) ..... *passim*

Tamayo v. Blagojevich,
526 F.3d 1074 (7th Cir. 2008) ..... *passim*

Tooley v. Napolitano,
586 F.3d 1006 (D.C. Cir. 2009) 20

Cited Authorities

Page

Townes v. Jarvis,
577 F.3d 543 (4th Cir. 2009) ..... *passim*

Village of Arlington Heights v. Metro. Housing Dev. Corp.,
429 U.S. 252 (1977) 17, 23

Washington v. Davis,
426 U.S. 229 (1976) 23

Wilkerson v. New Media Tech. Charter Sch., Inc.,
522 F.3d 315 (3d Cir. 2008) 19

UNITED STATES CONSTITUTION

U.S. Const. amend. XIV, § 1 3

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 ..... 1, 5, 6, 11

42 U.S.C. § 1981 17

42 U.S.C. § 2000e et seq. 24

Civil Rights Act of 1871,
42 U.S.C. § 1983 24

Cited Authorities

Page

Fair Housing Act of 1968,
42 U.S.C. § 3601 et seq. 20, 24

Section 2 of the Voting Rights Act of 1965 24

Title VII of the Civil Rights Act of 1964 24

Va. Code Ann. § 53.1-151(B1) 6

OTHER AUTHORITIES

Fed. R. Civ. P. 8(a)(2) 2

Fed. R. Civ. P. 12(b)(6) 2, 5

Carl Melvin Townes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' opinion on rehearing affirming the dismissal of Petitioner's 28 U.S.C. § 2254 petition is published and reported at 577 F.3d 543 (4th Cir. 2009), and is reproduced in the Petition Appendix ("App.") at App. 1a-32a. The opinion of the district court (Hilton, J.) dismissing Petitioner's 28 U.S.C. § 2254 petition is unpublished and is reproduced at App. 33a-47a.

JURISDICTION

The court of appeals issued its opinion on rehearing on August 19, 2009. The Chief Justice granted Petitioner's application for an extension of time to file a petition for a writ of certiorari, extending the due date until December 17, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The following statutory provisions are relevant to this case:

28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was

> adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Fed. R. Civ. P. 8(a)(2):

> A pleading that states a claim for relief must contain:
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief.

Fed. R. Civ. P. 12(b)(6):

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> (6) failure to state a claim upon which relief can be granted.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

To survive a motion to dismiss, a complaint generally must set forth sufficient well-pled facts to state a "plausible" claim for relief. *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009). However, since at least 2002, it has been clear that in an intentional discrimination case, federal pleading requirements do not mandate that a plaintiff set forth — in the complaint — specific facts demonstrating that the discrimination was *intentional*. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514-15 (2002). *Swierkiewicz* implicitly recognized that those subject to discrimination will rarely, if ever, be able to allege in the complaint specific facts that would, if proven, establish the intent of others who have discriminated.

This case squarely presents an issue on which there currently is a deep and mature conflict among the courts of appeals: in an intentional discrimination case, in light of this Court's decisions in *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544 (2007), and *Iqbal*, what is the pleading standard with respect to intent?[1] On the one hand, some circuits have held that even after this Court's decision in *Twombly*, *Swierkiewicz* remains good law; thus, provided a complaint provides notice of the claim and the grounds upon which it rests, it can allege the intent element in conclusory fashion, including on information and belief.[2] By contrast, other circuits have held that *Swierkiewicz* is no longer good law in light of *Twombly* and *Iqbal*, holding that a complaint alleging intentional discrimination must allege specific facts supporting a plausible inference that the discrimination was, in fact, intentional.[3]

This case presents an ideal vehicle to resolve the deep split among the circuits on this issue. Carl Melvin Townes was denied parole eligibility by the Commonwealth of Virginia, apparently based on that state's "three-strikes" law. Mr. Townes, proceeding *pro se*, filed a habeas corpus petition under

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1. The conflict has developed as a result of this Court's decisions in a quartet of cases. *See Iqbal*, 129 S. Ct. 1937 (2009); *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam); *Twombly*, 550 U.S. 544 (2007); *Swierkiewicz*, 534 U.S. 506 (2002).

2. *Boykin v. KeyCorp*, 521 F.3d 202, 212-16 (2d Cir. 2008); *Ruffin v. Nicely*, 183 F. App'x 505, 513 (6th Cir. May 18, 2006); *Lindsay v. Yates*, 498 F.3d 434, 440 n.6 (6th Cir. 2007); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1082-85 (7th Cir. 2008); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008).

3. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009); *Townes v. Jarvis*, 577 F.3d 543, 551-52 (4th Cir. 2009) (also reproduced at App. 16a-18a).

28 U.S.C. § 2254, in which he alleged, with a supporting newspaper article, that (1) he is a black male; (2) he was denied parole eligibility based on the state's three-strikes law; (3) at around the same time, another prisoner — a white woman — was granted parole eligibility; (4) the two cases were virtually indistinguishable insofar as they both involved three or four similar robberies within a very short period of time; and (5) the denial of Mr. Townes' parole eligibility "can be seen as deliberate discrimination." (Supplemental Appendix ("Supp. App.") SA1-SA14.) The Fourth Circuit, applying Federal Rule of Civil Procedure 12(b)(6), affirmed dismissal of his petition, holding that with respect to the element of intent, in order to survive a motion to dismiss, Mr. Townes was required to plead specific facts that, if proven, "would demonstrate that the Board *intentionally* discriminated against him." (App. 17a (emphasis in original).) This holding is precisely the opposite of, for example, a recent holding from the Second Circuit — after *Twombly* — that a complaint has sufficiently alleged the intent element if it states "that plaintiffs are African-Americans, described defendants' actions in detail, and alleged that defendants selected plaintiffs for maltreatment solely because of their color." *Boykin*, 521 F.3d at 215 (internal quotations and alterations omitted).[4]

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4. Similarly, in the Seventh Circuit, a complaint need only contain "an allegation as simple as 'I was turned down a job because of my race' . . . to plead sufficiently race discrimination in violation of the Equal Protection clause." *Brown v. Budz*, 398 F.3d 904, 916 n.1 (7th Cir. 2005) (quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (internal quotations omitted)). This standard has been reaffirmed in decisions subsequent to this Court's opinion in *Twombly*. *See, e.g.*, *Tamayo*, 526 F.3d at 1084.

This is a critically important issue on which there is a deep division among the courts of appeals. This Court should grant a writ of certiorari in this case to resolve this split among the circuits.

STATEMENT OF THE CASE

On May 11, 2004, Mr. Townes, who was proceeding *pro se*, filed a habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Virginia.[5] (Supp. App. SA1.) The *pro se* petition alleges that the Virginia Parole Board violated Mr. Townes' equal protection and due process rights when it found him to be ineligible for parole under Virginia's three-strikes statute. (Supp. App. SA2-SA3.)[6]

Among other things, Mr. Townes' *pro se* petition alleges:

- Mr. Townes is a "black male from the projects of Richmond." (Supp. App. SA4.)

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5. His case was subsequently transferred to the United States District Court for the Eastern District of Virginia.

6. Virginia Code section 53.1-151(B1) provides that "[a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon . . . when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole." Va. Code Ann. § 53.1-151(B1). Mr. Townes was convicted on two counts of robbery by the presenting of firearms, and one count of simple robbery — thus he was ineligible for treatment under the three-strikes statute.

- Between October of 1991 and February of 1992, Mr. Townes was convicted of, and was sentenced on, two counts of robbery by the presenting of a firearm and one count of simple robbery, arising from three crimes committed over a 10-day span. (Supp. App. SA1, SA9-SA11.)

- After he began serving his sentence, the Virginia Department of Corrections ("VDOC") determined that he was not eligible for parole under the state's three-strikes statute, even though only two of his convictions qualified for consideration under that law. (Supp. App. SA9-SA10.)

- On March 5, 2002, Mr. Townes appealed this determination to the Virginia Parole Board, which affirmed the VDOC's parole ineligibility determination based on the Virginia three-strikes statute. (Supp. App. SA9.)

- He was not convicted of three qualifying offenses, and all three of his offenses were part of a "common scheme." (Supp. App. SA10.)

- Another prisoner who was in the custody of VDOC, Sue Kennon, was a "white, middle class female." (Supp. App. SA10.)

- Ms. Kennon had been convicted of four robberies by the presenting of firearms that took place over a period of eight days. (Supp. App. SA10, SA13-SA14.)

- The Virginia Parole Board determined Ms. Kennon to be parole eligible based on its finding that Ms. Kennon's four qualifying offenses should be considered as a common scheme. (Supp. App. SA10.)

- The facts of Ms. Kennon's case were similar to his own, but Ms. Kennon received more favorable treatment from the Virginia Parole Board. (Supp. App. SA4, SA11.)

- The "refusal of the [Virginia Parole] Board to grant Petitioner the same form of consideration can be seen as deliberate discrimination." (Supp. App. SA11.)

- Because he had been treated less favorably on account of his race and gender, the Virginia Parole Board had violated his equal protection rights. (Supp. App. SA11.)

On October 4, 2004, the Commonwealth filed a motion to dismiss Mr. Townes' habeas petition. On February 17, 2005, the United States District Court for the Eastern District of Virginia granted the motion and dismissed Mr. Townes' petition. (App. 37a.) In its memorandum opinion, the court acknowledged Mr. Townes' allegation that he had been treated differently than Ms. Kennon, but held that Mr. Townes had "not asserted that he was similarly situated to any other prisoner for the purposes of determining parole eligibility." (App. 43a.)

Still proceeding *pro se*, Mr. Townes appealed the district court's dismissal, and the court of appeals appointed the undersigned counsel of record to represent Mr. Townes on appeal. The court of appeals twice heard oral argument, and on July 22, 2009, issued an opinion affirming the district court's ruling.[7] On August 5, 2009, Mr. Townes petitioned the court of appeals for rehearing and rehearing *en banc*. On August 19, 2009, the court of appeals granted Mr. Townes' petition for rehearing and issued a revised opinion affirming the district court's dismissal of Mr. Townes' habeas petition.[8]

In its revised opinion, the court of appeals acknowledged that Mr. Townes alleged facts tending to show that he was similarly situated to a white, upper middle-class, female inmate with similar convictions, but who nonetheless was determined to be eligible for parole notwithstanding the Commonwealth's three-strikes statute. (App. 16a.) The court held, however, that Mr. Townes had failed to allege facts sufficient to satisfy the element of intentional discrimination. (App. 16a-18a.) Specifically, the court of appeals held that Mr. Townes' allegation "that his case *can be seen* as deliberate discrimination" was insufficient to satisfy the pleading

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7. After the first oral argument, but while his appeal was still pending, Mr. Townes was placed on mandatory parole by the Commonwealth. At the second oral argument, the parties addressed, among other things, whether release on mandatory parole mooted Mr. Townes' claims. The panel majority, over the dissent of one judge, held that it did not. (App. 10a.)

8. The court of appeals neither granted nor denied Mr. Townes' petition for rehearing *en banc*, and instead issued its mandate on September 10, 2009.

standard required for the element of intentional discrimination, (App. 17a-18a (internal quotations omitted) (emphasis in original)), and held that he must also allege "*facts* . . . supporting the contention that the Board intentionally discriminated against him because of his race," (App. 18a (emphasis in original).)[9]

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9. The court of appeals also held, without explanation, that Mr. Townes had not

> identified any clearly established *federal* law that prohibits the Board from considering conduct unnecessary to a conviction as part of its three-strikes determination. Nor has he demonstrated that the state unreasonably determined any facts in applying the governing legal principles to his case. This claim cannot, therefore, provide a basis for habeas relief.

(App. 13a (emphasis in original).) In so holding, the court of appeals did not even acknowledge the overwhelming authority holding that an unreasonable application of state law may, in and of itself, give rise to a *federal* due process violation if it infringes on a protected liberty interest. *See, e.g., Douglas v. Buder*, 412 U.S. 430, 431-32 (1973) (per curiam) (holding that state's determination purporting to support its revocation of parole was "so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment"); *Richmond v. Lewis*, 506 U.S. 40, 50 (1992) ("[T]he federal, constitutional question is whether [a state law error] is 'so arbitrary or capricious as to constitute an independent due process . . . violation.' " (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990))); *Cummings v. Sirmons*, 506 F.3d 1211, 1237 (10th Cir. 2007) ("[T]he United States Supreme Court has suggested that, in rare circumstances, a determination of state law can be so arbitrary or capricious as to constitute an independent due process violation." (internal quotations and alterations omitted)); *Sanna v. Dipaolo*, 265 F.3d 1, 11-12 (1st Cir. 2001) ("[A] state law or practice that betrays a fundamental principle of justice offends the Due Process Clause. . . . Thus, a state court's error in

(Cont'd)

Mr. Townes now seeks review of the judgment of the court of appeals.

REASONS FOR GRANTING THE PETITION

I. There Is A Deep And Mature Circuit Split On The Pleading Standard Applicable To Intentional Discrimination Claims.

As discussed below, there is a deep conflict among the courts of appeals on the current pleading standard for intentional discrimination claims, and a brief discussion of this Court's recent jurisprudence on pleading standards provides helpful context to how the split has arisen and deepened.

(Cont'd)
applying a state rule sometimes can have constitutional implications. . . . That in turn, may afford a basis for federal habeas relief." (internal citations omitted)); *Smith v. Horn*, 120 F.3d 400, 414-15 (3d Cir. 1997) (holding that a state may generally define the elements of a state criminal offense as it sees fit, but the Fourteenth Amendment's Due Process Clause prohibits the state from disregarding these elements when convicting a person of that offense); *Mack v. Caspari*, 92 F.3d 637, 640 (8th Cir. 1996) ("[A] contention that a state court has applied a procedural rule arbitrarily to a defendant's prejudice may state a federal constitutional due process violation . . . ."); *Ballard v. Estelle*, 937 F.2d 453, 456 (9th Cir. 1991) ("Mr. Ballard's claim that his sentence violated California sentencing laws because a different definition of 'personal use' of a firearm was used than California has adopted in other cases sets forth a cognizable federal habeas corpus claim based on the due process clause of the Fourteenth Amendment."). Mr. Townes alleged that the Virginia Parole Board's application of the state's three-strikes law was objectively unreasonable, arbitrary, and capricious, in violation of his federal due process rights. Such an allegation does indeed state a federal claim capable of review in a Section 2254 petition.

A. This Court Has Issued Several Recent Decisions Concerning Pleading Requirements.

Recent years have seen a flurry of decisions from this Court concerning pleading standards in civil cases. In 2002, this Court held that a plaintiff alleging intentional discrimination need only comply with the "simplified notice pleading standard" under the Federal Rules of Civil Procedure. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002). There, a court of appeals had affirmed dismissal of a complaint alleging employment discrimination under Title VII because the complaint did not allege facts supporting an inference that the employer had acted intentionally. *Id.* at 509. This Court reversed, holding that the complaint only had to provide fair notice of the claim and that plaintiff had done so by alleging that he was terminated on the basis of his national origin and age and providing some details of the surrounding events. *Id.* at 514. The opinion for the Court criticized the pleading standard imposed by the court of appeals:

> Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Id. at 511-12.

Five years later, in *Bell Atlantic Corp. v. Twombly*, this Court held, in the context of an antitrust case, that the factual allegations in a complaint must be sufficient to state a claim that is "plausible on its face," not merely "conceivable." 550 U.S. 544, 570 (2007). *Twombly* expressly rejected an earlier standard, established in *Conley v. Gibson*, under which " 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* at 561 (quoting *Conley*, 355 U.S. 41, 45-46 (1957)). The opinion for the Court in *Twombly*, in *dicta*, reaffirmed *Swierkiewicz*'s continued vitality in a passage the courts of appeals have struggled to apply since its publication:

> *Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements. Even though *Swierkiewicz*'s pleadings detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination, the Court of Appeals dismissed his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting

> that Swierkiewicz allege specific facts beyond those necessary to state his claim and the grounds showing entitlement to relief. Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.

Id. at 570 (internal quotations and citations omitted). Days later, in *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam), this Court held, in the context of a *pro se* complaint, that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' " 551 U.S. at 93. This Court explained that a *pro se* plaintiff need not allege "[s]pecific facts" and "need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.' " *Id.* (quoting *Twombly*, 550 U.S. at 555 (internal quotations to *Conley* omitted)).

Twombly and *Erickson* resulted in extensive discussion by a number of courts of appeals on whether the holding of *Swierkiewicz* was still good law. *See* discussion in Section I.B., *infra*. Then, most recently, in *Ashcroft v. Iqbal*, this Court expanded and elaborated on *Twombly*, outlining a "two-pronged" approach under which, first, a court should identify "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and, second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." __ U.S. __, 129 S. Ct. 1937, 1950 (2009). In *Iqbal*, the respondent alleged that high-level government

officials "adopt[ed] a policy approving restrictive conditions of confinement for post-September-11 detainees until they were cleared by the FBI." *Id.* at 1952 (internal quotations to complaint omitted). The respondent alleged this action was taken "on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution." *Id.* at 1944. Critically, in *Iqbal*, the respondent's "complaint [did] not show, or even intimate, that petitioners purposefully [detained individuals] due to their race, religion, or national origin." *Id.* at 1952; *see also Al-Kidd v. Ashcroft*, 580 F.3d 949, 974 (9th Cir. 2009) ("In reviewing the complaint in *Iqbal*, the Court noted that the complaint did not contain any factual allegations claiming that Mueller or Ashcroft may have intentionally discriminated on the basis of race or religion."). Instead, the respondent alleged only that the Government had enacted a policy that resulted in disparate treatment. *Iqbal*, 129 S. Ct. at 1951-52. This Court emphasized that "petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic." *Id.*

Because the respondent in *Iqbal* did not allege intentional discrimination, *Iqbal* did not present or resolve whether *Swierkiewicz* was still good law. Indeed, the opinion for the Court in *Iqbal* does not discuss, criticize, overrule, cite, or even mention *Swierkiewicz*. As discussed below, the result has been a deep conflict in the courts of appeals on whether *Swierkiewicz* is still good law after *Twombly*.

B. There Is Disagreement Among The Circuits On Whether *Swierkiewicz* Remains Good Law.

A writ of certiorari is warranted because there is a concrete split among the circuits regarding whether this Court's decision in *Swierkiewicz* remains good law in light of the Court's recent pleading standards decisions. Specifically, as discussed below, the Third and Fourth Circuits have held, either explicitly or implicitly, that *Swierkiewicz* is no longer good law, but the Second, Sixth, Seventh, and District of Columbia Circuits have all affirmed *Swierkiewicz*'s continued vitality. It is thus not clear whether a plaintiff must allege specific facts supporting a plausible inference of intent in an intentional discrimination case, or whether a plaintiff may instead allege intent in a conclusory manner provided that other details — like protected status and the discriminatory act — are supported by well-pled facts.

This case squarely presents the issue. In *Townes*, the Fourth Circuit held that a plaintiff must do more than conclusorily allege intentional discrimination in order to satisfy the element of intent. In the opinion below, the court of appeals affirmed dismissal of Mr. Townes' equal protection claim, concluding that Mr. Townes "failed to allege facts sufficient to satisfy the second element of [a race- or sex-based equal protection] claim — intentional discrimination." (App. 16a.) Although the court acknowledged Mr. Townes' allegation that the Board treated him differently from a similarly-situated white woman, and his allegation that this " '[could] be seen as deliberate discrimination,' " (App. 15a, 17a-18a (quoting complaint)),

the court of appeals held that these allegations were insufficient to state an equal protection claim because Mr. Townes failed to allege additional facts supporting an inference of discriminatory intent, such as "a 'consistent pattern' of intentional discrimination by the Parole Board" or " 'contemporary statements by decisionmakers' evidencing intentional discrimination by the Board," which this Court has noted *may prove* intentional discrimination. (*See* App. 18a (quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 819 (4th Cir. 1995) (citing *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-68 (1977))).) By requiring additional factual allegations relating to intent beyond stating that one was intentionally discriminated against, the Fourth Circuit implicitly held that *Swierkiewicz* is no longer the controlling standard for plaintiffs alleging civil rights violations.[10]

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10. The Fourth Circuit, in *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 346 (4th Cir. 2006), *reh'g en banc denied*, 467 F.3d 378, *cert denied*, 127 S. Ct. 2036 (2007), similarly rejected application of *Swierkiewicz*. There, the plaintiff, a black man, alleged that another employee referred to black individuals as "monkeys" and "apes" in his presence, that he complained to his supervisors about this, and that he was soon thereafter discharged. *Id.* at 336-37. The plaintiff claimed that "his race was a motivating factor in being fired" and, accordingly, that he was discriminated against in violation of 42 U.S.C. § 1981. *Id.* at 344 (internal quotations omitted). The panel majority affirmed the district court's dismissal of the plaintiff's claim because the plaintiff had failed to allege that he was discharged "*because of his race*," notwithstanding his argument that his allegations raised the inference that his managers tolerated or condoned racist remarks, constituting evidence of racial bias. *Id.* at 345. The Honorable Robert B. King dissented, noting that the majority's holding "brought [the Fourth Circuit's]

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In the same vein, the Third Circuit has also held that *Swierkiewicz* is no longer good law. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). In *Fowler*, the court was faced with a district court's dismissal of an employer's complaint alleging disability discrimination. *Id.* at 205. The court had asked the parties "to comment on the continued viability of" *Swierkiewicz* in light of *Twombly* and *Iqbal*, and attempted to reconcile these three decisions. *See id.* at 209-11; *see also id.* at 211 (noting that *Swierkiewicz* and *Iqbal* "both dealt with the question of what sort of factual allegations of discrimination suffice for a civil lawsuit to survive a motion to dismiss"). The court concluded that *Swierkiewicz* had been "repudiated by both *Twombly* and *Iqbal* . . . as it concerns pleading requirements and relies on *Conley*," but further observed that "[t]he demise of *Swierkiewicz* . . . is not of significance" in the Third Circuit because that circuit already applied a

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jurisprudence into direct conflict with the Supreme Court's unanimous decision in *Swierkiewicz*." *Id.* at 357 (King, J., dissenting). Judge King concluded that the plaintiff's "allegation that he was fired for reporting the 'black monkeys' comment 'because he is African-American' cannot be distinguished from Swierkiewicz's allegations 'that he had been terminated on account of his national origin' and 'his age.' " *Id.* at 359. By a 5-5 vote, the Fourth Circuit denied *en banc* review and thereby upheld the panel majority's analysis. Dissenting from the denial of rehearing *en banc*, Judge King, writing for himself and four other members of the court, observed that the panel majority's ruling "contravenes controlling Supreme Court precedent in *Swierkiewicz*," and, "[t]o make matters worse, the majority based its Rule 12(b)(6) ruling on the very reason rejected by the Court in *Swierkiewicz*: that [the plaintiff's] complaint 'rested on his illogical conclusory statement that his race was a "motivating factor" for his firing.' " 467 F.3d at 382 (quoting 458 F.3d at 345).

heightened pleading standard for discrimination claims following *Twombly*. *See id.* at 211 (citing *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315 (3d Cir. 2008)).[11]

The Second, Sixth, Seventh, and District of Columbia Circuits, on the other hand, have continued to apply *Swierkiewicz* in intentional discrimination cases, even after *Twombly*. *See Boykin v. KeyCorp*, 521 F.3d 202, 212-16 (2d Cir. 2008) (applying *Swierkiewicz* and holding that complaint sufficiently stated a claim where plaintiff simply alleged that denial of loan was based on her race and sex); *Ruffin v. Nicely*, 183 F. App'x 505, 513 (6th Cir. May 18, 2006) (holding that plaintiff sufficiently stated race-discrimination claim by alleging that he was an African-American man who applied for, but was not selected to receive, a state contract because he "may be able to uncover direct or indirect evidence of racial animus"); *Lindsay v. Yates*, 498 F.3d 434, 440 n.6 (6th Cir. 2007) (finding "no basis for concluding that *Swierkiewicz* is no longer good law" after *Twombly* "[b]ecause the Supreme Court majority [in *Twombly*] distinguished *Swierkiewicz* and nowhere expressed an intent to overturn it"); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1085 (7th Cir. 2008) (reversing district court's dismissal of Title VII complaint alleging that female plaintiff was paid less than similarly-situated males on account of her sex because the allegations "certainly provide[d] the defendants with sufficient notice to begin to investigate and defend against her claim"); *Aktieselskabet AF 21. November 2001 v. Fame Jeans*

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11. Ultimately, however, the Third Circuit held that Fowler's complaint "alleged sufficient facts to state a plausible" claim. 578 F.3d at 211.

Inc., 525 F.3d 8, 15 (D.C. Cir. 2008) (noting that "[m]any courts have disagreed about the import of *Twombly*" and holding that *Twombly* "leaves the long-standing fundamentals of notice pleading intact");[12] *see also Al-Kidd v. Ashcroft*, 580 F.3d 949, 974 (9th Cir. 2009) (concluding that the *Twombly* Court "reaffirmed the holding of *Swierkiewicz*" and "expressly disclaimed any intention to require general 'heightened fact pleading of specifics' " (quoting *Twombly*, 550 U.S. at 570)).

For example, in *Boykin*, the Second Circuit held that a conclusory allegation of discriminatory intent was sufficient to state a claim for housing discrimination, in violation of the Fair Housing Act. 521 F.3d at 214-15. There, an African-American woman alleged that she was denied a home equity loan, that this was done, in part, because of her race and sex, and that "similarly situated loan applicants who were not in the protected classes received loans and were treated more favorably throughout the loan application process." *Id.* at 214-15. The Second Circuit held that the complaint alleged nothing less than the complaint upheld in *Swierkiewicz*:

> In short, Boykin identified the particular events giving rise to her claim and alleged that she was treated less favorably than other loan

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12. Reflecting the confusion among the circuits, another panel of the District of Columbia Circuit called into question *Aktieselskabet AF 21. November 2001. See Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009) (stating that the court was failing to reject, although not otherwise addressing, an argument "that *Iqbal* extended *Twombly*, thus invalidating a construction of *Twombly* previously advanced by this court in *Aktieselskabet AF 21 November 2001 v. Fame Jeans*, 525 F.3d 8 (D.C. Cir. 2008)").

> applicants because of her race, her gender and location of her property, just as the complaint in *Swierkiewicz* provided the date and circumstances of the plaintiff's termination and alleged that employees of other nationalities were treated differently than the plaintiff.

Id. at 215. The court also concluded that the more liberal standard for construing *pro se* complaints, as discussed by this Court in *Erickson*, supported its holding that the plaintiff's complaint stated a claim. *Id.*

Similarly, in the Seventh Circuit, a complaint need only contain "an allegation as simple as 'I was turned down a job because of my race' . . . to plead sufficiently race discrimination in violation of the Equal Protection clause." *Brown v. Budz*, 398 F.3d 904, 916 n.1 (7th Cir. 2005) (citing *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998)). After *Twombly*, the Seventh Circuit "reaffirmed the minimal pleading standard for simple claims of race or sex discrimination." *Tamayo*, 526 F.3d at 1084 (citing *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 782 (7th Cir. 2007)). The Seventh Circuit appropriately recognizes that " 'once a plaintiff alleging illegal discrimination has clarified that it is on the basis of her race, there is no further information that is both easy to provide and of clear critical importance to the claim.' " *Tamayo*, 526 F.3d at 1084 (quoting *Concentra Health Servs., Inc.*, 496 F.3d at 781-82). Thus, where a female plaintiff alleges that she was paid less than similarly-situated male employees because of her sex, it is "difficult to see what more [plaintiff] could have alleged, without pleading evidence, to support her claim

that she was discriminated against based — at least in part — on her sex." *Tamayo*, 526 F.3d at 1085. In fact, the Seventh Circuit has applied these principles to a situation nearly identical to Mr. Townes'. *See Pacheco v. Lappin*, 167 F. App'x 562 (7th Cir. Feb. 1, 2006). In *Pacheco*, the plaintiff alleged that the Bureau of Prisons refused to admit him into a substance-abuse program "on the ground that he lacked sufficient documentation, while it accepted white prisoners who had even less documentation." *Id.* at 564. The complaint also identified one such white prisoner who was admitted to the program with less documentation. *Id.* The Seventh Circuit held that, based on the plaintiff's allegations and in light of *Swierkiewicz*, the plaintiff had stated an equal protection claim. *Id.*

On this issue, the holdings of the Third and Fourth Circuits thus conflict with the holdings in the Second, Sixth, Seventh, and District of Columbia Circuits. In other words, in four circuits, Mr. Townes would have clearly stated an equal protection claim,[13] and in two circuits, he probably would not have.[14]

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13. Courts have consistently and routinely held that *Swierkiewicz* applies to equal protection claims. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004); *Pacheco*, 167 F. App'x at 564-65; *Perry v. Oltmans*, 106 F. App'x 476, 479 (7th Cir. July 15, 2004); *Kwai Fun Wong v. United States*, 373 F.3d 952, 975 (9th Cir. 2004).

14. The Fourth Circuit also erred by failing to follow *Swierkiewicz*'s holding that a plaintiff need not plead the elements of an *evidentiary* standard to withstand a motion to dismiss. *Swierkiewicz*, 534 U.S. at 510 (holding that "[t]he prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement"). The Fourth Circuit committed an analogous error by requiring Mr. Townes to allege

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The holding of the Fourth Circuit, if permitted to stand, will have a significant and far-reaching impact. Circumstantial evidence of discriminatory intent is frequently all that victims of discrimination may possess at the outset of litigation. *See, e.g., Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor."). Without *Swierkiewicz*, many valid discrimination claims will never make it past a motion to dismiss. Moreover, Congress has created private rights of action for individuals who are the victims of discrimination in a number of contexts, including

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facts like those this Court described in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-68 (1977), as sufficient (but not necessary) to demonstrate discriminatory intent. (*See* App. 18a (affirming the dismissal of Mr. Townes' complaint because he did not "allege[] any of the[se] factors").)

Moreover, the Fourth Circuit ignored the well-established rule that *pro se* pleadings must be liberally construed. *See Erickson*, 551 U.S. at 94 ("A document filed *pro se* is 'to be liberally construed,' . . . and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.' " (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))). In fact, the Fourth Circuit went so far as to criticize Mr. Townes for alleging that the Parole Board's action " '*can be seen as* deliberate discrimination' " rather than alleging that "the Board actually did intentionally discriminate against him," (App. 18a (quoting complaint) (emphasis added by Fourth Circuit)), allegations which, to the layperson, would appear identical.

employment (Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.), housing (Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq.), voting (Section 2 of the Voting Rights Act of 1965), and state action (Civil Rights Act of 1871, 42 U.S.C. § 1983). In addition to these private rights of action, individuals in state custody frequently have good faith civil rights challenges to their detention deserving of judicial resolution and not merely summary dismissal on a motion to dismiss. Thus, the Fourth Circuit's decision, if allowed to stand, would not only frustrate Congress's purpose in enacting significant legislation to combat discrimination, but would also severely burden victims of discrimination and inevitably deter the filing of, and result in the dismissal of, potentially meritorious lawsuits.

II. This Case Presents An Ideal Vehicle For Review Of These Issues

This case presents a perfect vehicle through which to resolve this division among the circuits. This Court has jurisdiction to review the decision of the court of appeals, and Mr. Townes' petition was timely, as were each of his prior prayers for relief. The equal protection issue raised by this petition is ripe for decision, Mr. Townes has raised this claim at every stage of the proceedings after the Parole Board's decision, and there are no problems regarding preservation.

In addition, Mr. Townes' appeal is not moot. In that regard, while Mr. Townes' appeal was pending in the Fourth Circuit, he was released on mandatory parole. During his term of supervised release, Mr. Townes must comply with the state-imposed conditions of his parole or risk being returned into custody. After his placement on

supervised release, Mr. Townes has continued to pursue his appeal because a favorable ruling could result in a new hearing before the Virginia Parole Board and a reduction in his term of supervised release. (App. 10a.) As the panel majority below recognized, Mr. Townes continues to suffer an injury in fact, even though he has been placed on supervised release, because the Parole Board's finding of ineligibility may affect the length of his supervised release. (App. 5a.) Furthermore, because the Parole Board "has absolute discretion in matters of parole," it is possible that a favorable ruling by the court would result in the Parole Board modifying Mr. Townes' sentence. (App. 10a (internal quotation omitted).) The panel majority held that this was enough to satisfy the redressibility requirement and concluded that Mr. Townes' appeal was therefore not mooted by his placement on supervised release. (App. 6a-10a.) One member of the panel dissented from the court's holding, and would have held that Mr. Townes' release on parole mooted his habeas challenge. (App. 19a-32a.)[15] Notwithstanding one panel member's dissent on this issue, it is clear that Mr. Townes' claims are not moot.

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15. There appears to be a disagreement among the circuits as to whether a prisoner's release on parole moots a challenge to the legality of the prisoner's detention when the prisoner seeks a reduction in his term of supervised release. *Compare Burkey v. Marberry*, 556 F.3d 142, 149-50 (3d Cir.) (release from custody moots such a challenge), *cert. denied*, 130 S. Ct. 458 (2009), *with Levine v. Apker*, 455 F.3d 71 (2d Cir. 2006) (not moot because ruling could ultimately result in the district court modifying the length of a habeas petitioner's supervised release), *and Mujahid v. Daniels*, 413 F.3d 991, 995 (9th Cir. 2005) (same). The Fourth Circuit's decision in this case was entirely consistent with the approach taken by the majority of courts of appeals to have considered this issue, and the court was correct in holding that Mr. Townes' petition is not moot.

CONCLUSION

This Court should grant the petition for a writ of certiorari.[16]

Respectfully submitted,

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16. Alternatively, summary reversal is warranted.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED AUGUST 19, 2009

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-7382

CARL MELVIN TOWNES,

Petitioner-Appellant,

v.

LARRY W. JARVIS, WARDEN; GENE M. JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Senior District Judge. (CA-04-582)

Argued: December 3, 2008

Decided: August 19, 2009

Before MOTZ, GREGORY, and SHEDD, Circuit Judges.

Affirmed by published opinion. Judge MOTZ wrote the opinion, in which Judge GREGORY joined. Judge SHEDD wrote a dissenting opinion.

Appendix A

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

The Virginia Parole Board found Carl Melvin Townes ineligible for discretionary parole. After a state court denied him habeas relief, Townes filed a petition for a writ of habeas corpus in federal court, claiming that the parole ineligibility determination violated his due process and equal protection rights. The district court dismissed the petition. We granted a certificate of appealability on both constitutional claims. Because the state released Townes from prison during the pendency of this appeal, it initially contends that Townes's claims are now moot. Alternatively, the state asserts that the district court properly dismissed the claims. Although we do not find the claims moot, we agree with the district court that Townes has failed to state any claim upon which relief can be granted and so affirm its dismissal of the case.

I.

During a ten-day period in February 1991, Townes robbed three fast-food restaurants in different Virginia counties. For two of these crimes, the state specifically convicted Townes of using or displaying a firearm as part of the felony offenses. But for the third, Townes pled guilty to common law robbery in exchange for the government declining to prosecute the additional firearm charge with which it charged Townes. As a result of these various convictions, the state committed Townes

to the custody of the Virginia Department of Corrections.

In Virginia, a prisoner generally becomes eligible for parole after serving a specified portion of his sentence. *See* Va.Code Ann. § 53.1-151(A) (2005). However, the state's "three-strikes" statute provides that "[a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon . . . when such offenses were not part of a common act, trans action or scheme shall not be eligible for parole." *Id.* § 53.1-151(B1). After the Department of Corrections makes a determination of parole ineligibility under this statute, the Virginia Parole Board ("the Board") may review that decision. *Id.*

The Board considered and rejected Townes's parole application, finding him ineligible for parole consideration pursuant to the three-strikes statute. Townes then filed a habeas corpus petition in the Supreme Court of Virginia, arguing that the Board violated his due process rights in its method of counting his predicate offenses and violated his equal protection rights by discriminating against him because of his race. The state court promptly dismissed his habeas petition as "frivolous." *Townes v. Dir. of the Dep't of Corrs.*, No. 032123 (Va. Nov. 5, 2003).

Townes next filed this habeas petition pursuant to 28 U.S.C. § 2254 (2006), naming as respondents Larry W. Jarvis, the warden of his prison, and Gene M.

Johnson, the Director of the Virginia Department of Corrections (collectively "the Warden"). Townes again asserted that the Board's parole ineligibility determination violated his due process and equal protection rights. The district court granted the Warden's motion to dismiss. Townes timely appealed.

While this appeal was pending, Virginia released Townes from prison on mandatory parole pursuant to Va.Code Ann. § 53.1-159 (2005). In addition to the conditions imposed by his parole, Townes must also serve a period of probation administered by the state courts.

II.

Initially, the Warden contends that Townes's release from custody moots this case. "[T]he doctrine of mootness constitutes a part of the constitutional limits of federal court jurisdiction. . . . [A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States v. Hardy*, 545 F.3d 280, 283 (4th Cir.2008) (quotations and citations omitted). Particularly relevant here, "[m]ootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (*quoting U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980)).

Thus, for a controversy to be moot, it must lack at least one of the three required elements of Article III standing: (1) injury in fact, (2) causation, or (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The Warden does not suggest that Townes lacked standing when he filed this complaint, but instead contends that Townes's *release* from prison moots this action. For the reasons that follow, however, Townes demonstrates that the Board's parole—ineligibility finding continues to result in collateral consequences with respect to the duration of his parole and probation. Thus, we cannot find this action moot.

First, Townes still asserts an injury-in-fact. Although his release from prison has foreclosed the possibility of a shorter period of incarceration, the parole ineligibility finding still may affect the length of his parole. *See Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (describing collateral consequences). Therefore, because Townes could receive a shorter period of parole if he receives a discretionary parole hearing, he has properly asserted an injury-in-fact. *See Mujahid v. Daniels*, 413 F.3d 991, 994-95 (9th Cir.2005).[1]

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1. Contrary to the dissent's suggestion, although Townes's release from prison has altered the ultimate relief he hopes the *Board* will grant (a shortened term of parole as opposed to a shortened sentence), the relief he seeks from the *federal courts* has remained constant. That is, Townes still requests a judgment that the Board's parole-ineligibility finding violated his constitutional rights and an order directing the Board to rescind

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Second, Townes continues to satisfy the causation prong of the standing requirement. Article III requires "a 'causal connection between the injury and the conduct complained of,' meaning that the injury is 'fairly traceable' to the defendant's actions." *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428 (4th Cir.2007) (*quoting Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). Here, the Board's parole ineligibility finding precludes Townes from an opportunity to obtain a shortened period of parole.

Finally, Townes has alleged an injury that still satisfies the redressability prong. "[F]or an injury to meet the redressability standard, 'it must be *likely*, as opposed to *merely speculative*, that the injury will be redressed by a favorable decision.' " *In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 216-17 (4th Cir.2008) (*quoting Lujan*, 504 U.S. at 561, 112 S.Ct. 2130). In some cases, like the one at hand, a plaintiff will seek *immediate* relief from a federal court as a necessary antecedent to the *ultimate* relief he seeks from a different entity, like an administrative agency. In these situations, to meet the redressability prong, a party must demonstrate that a favorable decision from the federal court likely would

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this finding. Moreover, also contrary to the dissent's suggestion, Townes need not again seek relief from the Board, which has already adjudicated Townes as statutorily ineligible for parole. The law does not require such a futile act. *Cf. Lynce v. Mathis*, 519 U.S. 433, 436-37 n. 4, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997); *Tesoro Refining & Mktg. Co. v. FERC*, 552 F.3d 868, 873-74 (D.C.Cir.2009).

provide him immediate relief, but need not demonstrate that it likely would provide him the ultimate, discretionary relief sought from the agency. *See FEC v. Akins*, 524 U.S. 11, 25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998).

In *Akins*, the Supreme Court specifically addressed this very issue. There the FEC contended that plaintiffs lacked standing because even if the agency "agreed with [the plaintiffs'] view of the law," it was "possible" that the FEC could "still have decided in the exercise of its discretion" not to grant them relief. *Id.* According to the FEC, plaintiffs had failed to show that their alleged harm was (1) fairly traceable to the FEC's decision and (2) redressable by judicial action. The Supreme Court flatly rejected this argument, explaining that it could not "*know* that the FEC would have exercised its . . . discretion" to deny plaintiffs relief. *Id.* (emphasis added). The Court further explained:

> Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. *If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action . . . even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason.* Thus [plaintiffs'] "injury in fact" is "fairly traceable"

> to the FEC's decision . . . , even though the FEC might reach the same result exercising its discretionary powers lawfully. *For similar reasons, the courts in this case can "redress" [plaintiffs'] "injury in fact."*

Id. (emphasis added; citations omitted). Thus, the Court in *Akins* held that a plaintiff could establish redressability simply by demonstrating that an agency "misinterpreted the law," even though the agency might ultimately "reach the same result." The Court recognized that, in this situation, a plaintiff can establish redressability without demonstrating that the agency would likely grant the ultimate relief sought; to require a showing of likelihood of ultimate relief in this situation would involve courts in the speculative (if not impossible) task of predicting how an agency will exercise its discretion.

Of course, *Akins* also indicates that if a court "know[s]" that an agency will not grant the ultimate relief the plaintiff seeks, the plaintiff lacks standing. *Id.* Or, put another way, if "no realistic possibility" exists that a plaintiff can obtain the ultimate relief, he will fail to satisfy the redressability prong. *See Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 56 (D.C.Cir.1991); *Ranger Cellular v. FCC*, 348 F.3d 1044, 1048-50 (D.C.Cir.2003).

The Supreme Court has applied this same standing analysis to cases in which plaintiffs challenge government racial set-aside policies. Such plaintiffs

need not show a likelihood that they would gain the *ultimate* relief sought. Rather, they need only show that they are "able and ready" to seek the opportunity and "that a discriminatory policy prevents [them] from doing so on an equal basis." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993); *see also W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 212-15 (5th Cir.1999); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 403-06 (6th Cir.1999).[2]

The immediate relief sought by Townes is a judgment that the state's parole-ineligibility determination was unconstitutional, necessitating a

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2. Contrary to the dissent's claim, Townes is "able and ready" to obtain the ultimate relief he seeks-a shortened period of parole. Moreover, our standing holding is not an "advisory opinion" but simply a straightforward application of *Akins* and the racial preference cases. Indeed, Townes' claim mirrors those of the plaintiffs in the racial preference cases. Like them, he alleges that "a discriminatory policy" (the Board's allegedly discriminatory parole ineligibility determination) "prevents" him from seeking something (a shortened period of parole) "on an equal basis" with other persons. *Northeastern Florida*, 508 U.S. at 666, 113 S.Ct. 2297. Thus, as one of our sister circuits has recently held, the standing framework set forth in the racial preference cases applies in the present context. *See Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1101-03 (D.C.Cir.2005) (applying *Northeastern Florida* to a parole regulation to find that "[a] decision from this court finding the regulation unlawful and requiring a new parole hearing with representation would redress [plaintiff's] injury").

remand to the district court to order the Parole Board to rescind that determination. We have previously granted similar relief. *See Fender v. Thompson*, 883 F.2d 303, 307-08 (4th Cir.1989) (remanding to the district court for entry of an order directing the Virginia Department of Corrections to rescind its parole ineligibility determination). Therefore, if Townes prevails on the merits before us, he likely will obtain the *immediate* relief he seeks.

Of course, Townes hopes that this immediate relief will result in a hearing before the Board and a reduction in the length of his parole. The Warden's contention that "[u]nder Virginia law, the Virginia Parole Board has absolute discretion in matters of parole," Supp. Br. of Appellees at 9, belies any suggestion that the Board lacks power to provide Townes relief. Given the wide discretion the Board enjoys, *see Vann v. Angelone*, 73 F.3d 519, 523 (4th Cir.1996), we do not "know" it would refuse to exercise its discretion to shorten Townes's period of parole. *Akins*, 524 U.S. at 25, 118 S.Ct. 1777. Like the Supreme Court in *Akins*, we refuse to speculate as to how an independent agency would exercise its discretion. *See id.* Thus, Townes has set forth facts sufficient to demonstrate that his claims are not moot, and we accordingly turn to the merits of his appeal.[3]

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3. Our friend in dissent attempts to find support for his position in a number of cases holding a claim moot because the plaintiff failed to allege that the challenged act resulted in continuing collateral consequences. *See Spencer*, 523 U.S. at 14-16, 118 S.Ct. 978 (parole revocation does not have collateral

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Appendix A

III.

Townes contends that the Supreme Court of Virginia's rejection of both his equal protection and due process claims provide a basis for habeas relief in this

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consequences that survive prisoner's release); *Hardy*, 545 F.3d at 283-85 (prisoner completed term of supervised release); *Incumaa v. Ozmint*, 507 F.3d 281, 286-89 (4th Cir.2007) (prisoner no longer subject to challenged condition of confinement); *Taylor v. Rogers*, 781 F.2d 1047, 1051 (4th Cir.1986) (same); *Inmates v. Owens*, 561 F.2d 560, 561-63 (4th Cir.1977) (same). These cases are inapposite because Townes clearly *does* allege continuing collateral consequences: he claims that the parole-ineligibility finding improperly extends his period of parole and probation. The dissent also seeks to rely on *United States v. Johnson*, 529 U.S. 53, 58-60, 120 S.Ct. 1114, 146 L.Ed.2d 39 (2000), which simply held that, under federal law, an error in a prisoner's release date does not automatically shorten the duration of that prisoner's term of supervised release. Mootness, however, was not at issue in *Johnson*. The dissent relies on one circuit's holding that *Johnson* renders such attacks on supervised release moot. *See Burkey v. Marberry*, 556 F.3d 142, 148-51 (3d Cir.2009). Not only does *Burkey* constitute out-of-circuit precedent interpreting the very different federal supervised release scheme, but it also represents a minority interpretation of *Johnson*. Two other circuits have held *Johnson* does not render such claims moot. *See Levine v. Apker*, 455 F.3d 71, 76-77 (2d Cir.2006); *Mujahid*, 413 F.3d at 993-95. We need not enter this fray because *Johnson* has no bearing on how the Virginia Parole Board chooses to exercise its "absolute" discretion over parole. *See Garrett v. Commonwealth*, 14 Va.App. 154, 415 S.E.2d 245, 247 (1992).

court.[4] We can grant habeas relief only when an underlying state-court adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(*l*)-(2) (2006); *see also Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Townes expressly acknowledges the applicability of this rigorous standard of review. *See* Brief of Appellant at 9. With it in mind, we examine first his due process claim and then his equal protection claim.

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4. We note that after Townes filed his complaint but prior to the filing of appellate briefs in this case, the Supreme Court held that 42 U.S.C. § 1983 (2000) provides a proper vehicle for challenges to state parole ineligibility determinations. *See Wilkinson v. Dotson,* 544 U.S. 74, 82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005). It is not entirely clear whether a habeas petition under 28 U.S.C. § 2254 (2006) may also provide an avenue for such a challenge. *See Benchoff v. Colleran,* 404 F.3d 812, 815 n. 4 (3d Cir.2005) (noting lack of clarity and citing cases); *Wilkinson,* 544 U.S. at 86-87, 125 S.Ct. 1242 (Scalia, J., concurring). However, *Wilkinson* does not expressly foreclose the use of § 2254 to bring such a challenge. Moreover, neither the state nor Townes's appointed counsel has suggested to us in briefs or at oral argument that a habeas petition is an improper vehicle for Townes' claim. Nor has any party ever urged that we construe the complaint as having been brought under § 1983 rather than § 2254. Accordingly, we treat Townes's claims as titled by him-the basis for habeas relief pursuant to § 2254.

Appendix A

A.

Townes alleges that the Board denied him due process rights when it found him ineligible for parole under the Virginia three-strikes parole ineligibility statute, Va.Code Ann. § 53.1-151(B1) (2005). He contends that this provision applies only if the state has proven that a person has committed three *armed* robberies, and he asserts that only two of his convictions meet this requirement. Townes concedes that the state convicted him of firearm offenses in connection with two of his robbery convictions. But he argues that because the state did not convict him of a firearm offense in connection with the third robbery, the Board erred in holding that that third crime counted as an armed robbery for purposes of the three-strikes statute.

Townes has not identified any clearly established *federal* law that prohibits the Board from considering conduct unnecessary to a conviction as part of its three-strikes determination. Nor has he demonstrated that the state unreasonably determined any facts in applying the governing legal principles to his case. This claim cannot, therefore, provide a basis for habeas relief. *See Ramdass v. Angelone*, 530 U.S. 156, 166, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000) (Kennedy, J., plurality op.).

B.

Townes, an African American, also maintains that the Board violated his equal protection rights by discriminating against him because of his race.

Specifically, he alleges that the Board violated these rights by declining to provide him the benefit of the "common act" exception to the three-strikes parole eligibility statute, when it did provide such a benefit to a Caucasian woman.

Townes contends that the "district court failed . . . to properly apply the [12(b)(6)] standard of review" in rejecting his equal protection claim. Brief of Appellant at 29, 30; *see also id.* at 31-35; Reply Brief at 16-19. When "assessing whether a § 2254 claim has been 'properly dismissed without an evidentiary hearing or discovery,' " a court "must evaluate its underlying allegations pursuant to the principles of Federal Rule of Civil Procedure 12(b)(6)." *Wolfe v. Johnson*, 565 F.3d 140, 160 (4th Cir.2009) (*quoting Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir.2006)). Therefore, a court must accept as true a habeas petition's well-pleaded allegations (but not its "legal conclusions," *see Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999)). Of course, when a state court has adjudicated a habeas claim on the merits (Townes concedes that, under controlling circuit precedent, the state court adjudicated his claim on the merit s, Brief of Appellant at 9 n. 3), the petitioner must allege facts sufficient to meet the exacting standard set forth in 28 U.S.C. § 2254(d) (2006). *See Bell v. Jarvis*, 236 F.3d 149, 158 (4th Cir.2000). Townes maintains that the allegations in his complaint, when taken as true, establish the Supreme Court of Virginia's decision as "based on an unreasonable determination

of the facts." 28 U.S.C. § 2254(d)(2).[5] For the following reasons this argument fails.

The Virginia three-strikes statute is race neutral. *See* Va.Code Ann. § 53.1-151(B1) (2005). Therefore, to succeed on any equal protection challenge to it, a litigant must allege facts demonstrating "[1] that he has been treated differently from others with whom he is similarly situated *and* [2] that the unequal treatment was the result of intentional or purposeful discrimination," i.e., in this case, discrimination on the basis of race. *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir.2001) (emphasis added).

Relying only on a single newspaper article, Townes alleges that he is similarly situated to Sue Kennon, reportedly a white, "upper middle-class housewife," who committed four robberies with a broken toy pistol over the course of eight days. *See* Bill Baskervill, *Convicted Bank Robber Finds Unlikely Allies*, Richmond Times Dispatch, July 28, 2003, at B5. According to the newspaper article, the Board ruled that Ken non's four crimes in eight days constituted "a single criminal act," exempting her from the three-strikes statute. *Id.* Kennon thus became eligible for discretionary parole, which the Board granted. *Id.*

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5. Townes also briefly asserts that the Supreme Court of Virginia's rejection of his equal protection claim "was contrary to and an objectively unreasonable application" of clearly established federal law. Brief of Appellant at 29. But he never offers any rationale for this assertion and we see none.

Clearly, in some respects Townes's and Kennon's crimes differ. Kennon committed four robberies in eight days with the same toy pistol while Townes, accompanied by various accomplices, committed three robberies in ten days with different real guns. Just as clearly, however, in some respects their crimes are similar. Both robbed a series of retail establishments. Both completed these robberies in less than two weeks. And both displayed a weapon during the robberies. But even assuming Townes alleged, and the state court unreasonably rejected, facts sufficient to satisfy the first element of an equal protection claim-unequal treatment of similarly situated persons[6]—he has failed to allege facts sufficient to satisfy the second element of such a claim-intentional discrimination.

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6. The district court suggested that "[i]n light of the myriad of factors involved in a parole decision, '[i]t is difficult to believe that any two prisoners could *ever* be considered 'similarly situated' for the purpose of judicial review of an equal protection claim.' " *Townes v. Jarvis*, No. 1:04cv582 (E.D.Va. Aug. 22, 2005) (emphasis added) (*quoting Reffitt v. Nixon*, 917 F.Supp. 409, 414 (E.D.Va.1996)). This analysis seems somewhat inapposite to the case at hand because Townes does not challenge the Board's ultimate decision to deny him parole based on any of a "myriad of factors." Rather he challenges the Board's refusal to provide him the benefit of the exception to the three-strikes statute, which rendered him *ineligible* for parole consideration. The three-strikes statute provides that this inquiry turns only on whether a person's crimes constitute "a common act, transaction or scheme." Va.Code Ann. § 53.1-151(B1) (2005). Two persons with *identical* criminal histories who committed identical crimes (perhaps co-conspirators) would surely be "similarly situated" for purposes of determining parole *eligibility*.

To satisfy this second element in a habeas petition, Townes must provide allegations sufficient to hold that the state court unreasonably determined the facts against him when it rejected his claim that the Board *intentionally* or *purposefully* discriminated against him on the basis of race. This is so because "[t]o prove that a statute has been administered or enforced discriminatorily," and so violates equal protection rights, a plaintiff must show "*more* . . . than the fact that a benefit was denied to one person while conferred on another." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 819 (4th Cir.1995) (emphasis added). He must also allege that the state intended to discriminate against him. *Id.* Townes alleges *no* facts that, if proved, would demonstrate that the Board *intentionally* discriminated against him. *See Rivera-Powell v. N.Y. City Bd. of Elections*, 470 F.3d 458, 470 (2d Cir.2006). *A fortiori*, Townes has failed to allege a basis for us to hold that the state court unreasonably determined his claim to be frivolous.

Of course, Townes alleges that "[i]n a similar case, (Sue Kennon), a white upper-middle-class woman in similar circumstances and facts was given consideration not given to this black male." But his *sole* allegation as to the Board's *motive* is:

> The arbitrary and [capricious] refusal of the Board to grant Petitioner the same form of consideration can be seen as deliberate discrimination: Ms. Kennon's crimes have received different treatment from Petitioner's

> crimes. Petitioner was a 16 year old, black male from the projects in Richmond while Ms. Kennon is a white, middle-class female.

Thus, Townes only alleges that his case "*can be seen as* deliberate discrimination" (emphasis added). Not only does he never allege that the Board actually did intentionally discriminate against him, but more significantly, Townes never alleges any of the factors that "have been recognized as probative of whether a decisionmaking body was motivated by a discriminatory intent." *Sylvia Dev. Corp.*, 48 F.3d at 819. For example, Townes does not allege a "consistent pattern" of intentional discrimination by the Parole Board, a "history of discrimination" by the Board, a "specific sequence of events" leading up to the Board's ineligibility finding, or "contemporary statements by decisionmakers" evidencing intentional discrimination by the Board. *Id.* In sum, Townes sets forth *no facts*-indeed no allegations-supporting the contention that the Board intentionally discriminated against him because of his race, let alone that the state court acted unreasonably in rejecting this claim.

Accordingly, the district court did not err in dismissing Townes's equal protection claim.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

Appendix A

SHEDD, Circuit Judge, dissenting:

Carl Melvin Townes commenced this habeas action in 2004 while he was a prisoner confined in a Virginia correctional center. In his petition, Townes argued that the state erred by classifying him as ineligible for discretionary parole, and he asked for an order directing the Virginia Parole Board (the "Board") to grant him parole. However, after the district court dismissed his petition on the merits as frivolous, the Board paroled Townes pursuant to Virginia's mandatory parole law. While the majority concludes that Townes' mandatory parole does not render his appeal moot, I conclude that it does because his claims no longer satisfy Article III's redressability requirement.

In essence, what Townes wants and what the majority provides is an advisory opinion. Townes does not argue that we can provide him with any relief that would directly remedy his alleged injury. Rather, he asserts that he would use an opinion from us stating that the Board erred in its parole eligibility determination to help him persuade the Board to exercise its discretion and shorten his current term of parole, thereby obtaining a remedy for his injury. However, the Board's decision to terminate a period of parole is guided by discretionary considerations that are wholly distinct from the factors that guided its decision to classify Townes as ineligible for discretionary parole from his earlier incarceration. Therefore, there is nothing in this record to support the conclusion that the Board would be likely to remedy Townes' injury by

shortening his parole if we issued a decision in his favor—a conclusion that we must reach before we can exercise jurisdiction over the merits of his appeal. Accordingly, I dissent.

I

While Townes was incarcerated for robbing three different restaurants, the Virginia Department of Corrections (the "VDOC") determined he was ineligible for consideration for discretionary parole because he had three qualifying convictions within the meaning of Virginia's three-strikes law. *See* Va.Code Ann. § 53.1-151(B1). Townes appealed that determination to the Board, which affirmed the VDOC's decision. Townes then challenged the Board's decision by filing a petition for writ of habeas corpus with the Virginia Supreme Court, but that court dismissed his petition as frivolous in November 2003.

Townes then commenced this habeas action in 2004, challenging the Virginia Supreme Court's decision. After the district court dismissed his petition as frivolous, we granted Townes a certificate of appealability. Before we decided his appeal, however, the Board paroled Townes pursuant to Virginia's mandatory parole law. *See* Va.Code Ann. § 53.1-159.[1] In light of his release from prison, we ordered the parties to file

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1. According to a stipulation submitted by the parties, Townes is currently serving a term of parole and a separate term of probation.

supplemental briefs on mootness. In his supplemental brief, Townes argues that his appeal still satisfies Article III requirements because (1) he continues to suffer collateral consequences or an injury-in-fact in the form of certain restrictions on his freedom that are associated with his current term of parole,[2] and (2) his injury is redressable because there is a "*possibility*" that the Board would exercise its discretion and shorten his parole if we issued an opinion stating that the Board erred in its earlier parole eligibility determination. *See* Supplemental Brief of Appellant at 2-3, 8-9 (emphasis added).

II

As the majority recognizes, we must resolve the threshold jurisdictional question of whether Townes' release from prison moots his challenge to the Board's parole eligibility determination. In answering this question, we need not resolve any novel issues of law. We have consistently held that a prisoner's transfer or release from prison moots his challenge to a determination that affected his confinement, including a determination that, according to the plaintiff, unlawfully deprived him of consideration for parole. *See, e.g., Taylor v. Rogers*, 781 F.2d 1047, 1049, 1051 (4th Cir.1986). Applying this well-established precedent here, I conclude that Townes' appeal is moot.

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2. Under the terms of his parole, Townes must *inter alia* maintain regular employment, permit the Parole Officer to visit his home, and follow the Parole Officer's instructions.

Appendix A

A.

The mootness doctrine is a limit on our jurisdiction that "originate[s] in Article III's 'case' or 'controversy' language." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). Generally speaking, mootness can be described as "the doctrine of standing set in a time frame," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (quotation marks omitted), and it recognizes that under Article III the plaintiff normally bears the burden of establishing throughout all stages of litigation (1) that he is suffering an injury-in-fact or continuing collateral consequence,[3] (2) that his injury is fairly traceable to the challenged action or decision, and (3) that a favorable decision *would be likely* to redress his injury. *Spencer*, 523 U.S. at 7, 10-14, 118 S.Ct. 978; *Hardy*, 545 F.3d at 283-84.

B.

Mindful of these Article III requirements, we have recognized that "[m]ootness questions often arise in cases involving inmate challenges to prison policies or conditions," and we have consistently held "that the

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3. When a plaintiff like Townes has been released from prison during the pendency of an action, the Supreme Court has used the concept of continuing "collateral consequences" as an alternative to the injury-in-fact requirement. *See Spencer v. Kemna*, 523 U.S. 1, 7-8, 14, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998); *see also United States v. Hardy*, 545 F.3d 280, 283-84 & n. 2 (4th Cir.2008).

transfer of an inmate from a unit or location where he is subject to the challenged policy, practice, or condition, to a different unit or location where he is no longer subject to the challenged policy, practice, or condition moots his claims." *Incumaa v. Ozmint*, 507 F.3d 281, 286-87 (4th Cir.2007); *see also Hardy*, 545 F.3d at 283-85; *Taylor*, 781 F.2d at 1049, 1051 (dismissing claim that plaintiffs were unlawfully denied consideration for parole as moot); *Inmates v. Owens*, 561 F.2d 560, 562 (4th Cir.1977). The reasons for finding mootness in such a context are clear:

> Any declaratory or injunctive relief ordered in the inmate's favor in such situations would have no practical impact on the inmate's rights and *would not redress* in any way the injury he originally asserted. And the newly situated inmate has no further need for such declaratory or injunctive relief, *for he is free of the policy or practice that provoked his lawsuit in the first place.*

Incumaa, 507 F.3d at 287 (emphasis added).

I conclude that these precedents control our analysis and render the claims Townes presented in his habeas petition and in his opening brief on appeal moot. As indicated above, Townes originally asserted that the Board erred by classifying him as ineligible for discretionary parole and thus keeping him incarcerated. However, in light of his release from prison, Townes is no longer ineligible for parole because of the

determination he challenged in his habeas petition. Indeed, he has already obtained the relief he sought in his petition—release from incarceration—because he is now on parole and is no longer in prison. Thus, any relief ordered in his favor "would not redress in any way the injury he originally asserted," and he "has no further need for . . . relief, for he is free of the policy or practice that provoked his lawsuit in the first place." *Id; see also Taylor*, 781 F.2d at 1048-49, 1051. Therefore, his claims are moot.[4]

In attempting to distinguish our precedents in this area of law, the majority suggests that they are inapposite because they all involved actions that were dismissed as moot "because the plaintiff failed to allege that the challenged act resulted in *continuing collateral consequences.*" *Maj. Op.*, at 549 n. 3 (emphasis added). Contrary to the majority's suggestion, however, our opinions in *Incumaa*, *Taylor*, and *Inmates* did not dismiss the plaintiffs' actions as moot for failure to allege continuing collateral consequences. In *Incumaa*, for example, it is apparent that we dismissed that action as

4. Our precedents in this area of law are in accord with cases from other circuits that apply the mootness doctrine and dismiss habeas cases like this one when an inmate challenges his parole eligibility and is then paroled while his case is on appeal. *See, e.g., Burkey v. Marberry*, 556 F.3d 142, 146-51 (3d Cir.2009); *Fendler v. U.S. Bureau of Prisons*, 846 F.2d 550, 555 (9th Cir.1988); *Vandenberg v. Rodgers*, 801 F.2d 377, 378 (10th Cir.1986); *Graham v. U.S. Parole Comm'n*, 732 F.2d 849, 850 (11th Cir.1984); *Granville v. United States*, 613 F.2d 125, 126 (5th Cir.1980); *Brady v. U.S. Parole Comm'n*, 600 F.2d 234, 236 (9th Cir.1979).

moot in part because of our inability to "redress" the plaintiffs' claimed injuries—not because of the plaintiffs' failure to allege continuing collateral consequences or an injury-in-fact. *Incumaa*, 507 F.3d at 283, 286-87 ("conclud[ing] that Incumaa no longer stands to benefit from the declaratory and injunctive relief he seeks" and noting that any "relief ordered in the inmate's favor in such situations would have no practical impact on the inmate's rights and would not *redress* in any way the injury he originally asserted" (emphasis added)).

Moreover, to the extent the majority is suggesting that I would dismiss Townes' action as moot for failure to allege collateral consequences, *see Maj. Op.*, at 549 n. 3, this is simply not correct. As indicated above, I conclude that Townes' appeal is moot because a decision in his favor would not be likely to redress his alleged injury and therefore would fail to satisfy this separate and independent Article III requirement. I express no opinion on whether he has proved collateral consequences or satisfied the other Article III requirements.

C.

Perhaps because Townes recognizes that *Incumaa* and our other precedents render his original claim moot, he presents a new argument in his supplemental brief.[5]

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5. *Compare* Brief of Appellant at 12-35 (arguing that Townes should be classified as eligible for parole), *with* Supplemental Brief of Appellant at 1-9 (arguing that Townes

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There, he argues that his appeal continues to satisfy the Article III redressability requirement—notwithstanding his release from prison—because, if we hold that the Board erred by classifying him as ineligible for discretionary parole, it is " *possib[le]* " that the Board will redress his alleged injury by exercising its discretion and shortening his current term of parole. *See* Supplemental Brief of Appellant at 8-9 (emphasis added).

1.

As previously stated, the Article III limits on our jurisdiction include a requirement that the plaintiff's injury be redressable, and it has long been settled that the normal standard for measuring whether an injury is redressable is whether a decision in the plaintiff's favor *would be likely* to remedy his injury. *See, e.g., Spencer*, 523 U.S. at 7, 118 S.Ct. 978. Here, Townes does not argue that a decision in his favor would be "likely" to remedy his injury. In fact, Townes does not argue that a decision in his favor would in any way directly remedy his injury. *See* Supplemental Brief of Appellant

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should be given a shorter period of parole). While the majority asserts that "the relief [Townes] seeks from the *federal courts* has remained constant," *Maj. Op.*, at 547 n. 1, this assertion is incorrect. In his federal habeas petition, Townes asked the court to provide three specific forms of relief, including an order directing the Board to parole Townes. Given that the Board has already paroled Townes, he is no longer seeking this form of relief and therefore the relief he is seeking from the federal courts has not remained constant.

at 8-9. Instead, Townes contends that he only needs to show that there is a "possibility" that a decision in his favor would redress his injury, and he asserts that he has made this showing because the Board might shorten his current term of parole if we issue a decision in his favor. *Id.*

In essentially agreeing with this argument, the majority concludes that Townes does not need to show that his asserted injury is likely to be redressed by a favorable decision from this Court. This is so, the majority states, because this case falls within a special category of cases where the plaintiff needs relief from a federal appeals court as a "necessary antecedent" to obtaining the ultimate relief he wants. *Maj. Op.*, at 547, 548. However, this is not one of those cases. As Townes acknowledged during oral argument, he does not need any merits-based relief from us to obtain a remedy for his injury. Indeed, Townes currently is (and has been) capable of asking the Board to shorten his parole, and the Board currently possesses authority to grant him this relief. *See, e.g.*, Va.Code Ann. § 53.1-136.[6] Accordingly, any asserted restriction on Townes' freedom can currently be adjusted through existing state legal and administrative processes regardless of whether he obtains favorable merit s-based relief from us.[7]

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6. Further, Virginia law authorizes a state court to shorten his term of probation. *See, e.g.*, Va.Code Ann. § 19.2-304.

7. Townes may understandably want an advisory opinion which he believes would assist him in obtaining the ultimate relief he wants, but that would be true of any number of litigants in federal court, and we simply are not empowered to issue such opinions.

The majority also states that the redressability analysis applied by the Supreme Court in racial set-aside cases supports its position because in those cases the plaintiff does not need to show that he is likely to obtain the ultimate relief he wants. *See Maj. Op.*, at 547-48. Contrary to the majority's suggestion, however, the Supreme Court's racial set-aside cases do not eliminate the requirement that a favorable decision be likely to remedy the plaintiff's injury. *See, e.g., Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663-64, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).

Moreover, the majority's reliance on set-aside cases is inapposite because in those case, as the majority recognizes, the plaintiff must include a showing that he is "able and ready" to seek the ultimate benefit he wants, *Maj. Op.*, at 548, and Townes cannot make this showing. He is not "able and ready" to obtain the ultimate relief he sought in his habeas petition-which was an order declaring him eligible for discretionary parole and the shortening of his term of incarceration-because he is no longer incarcerated and is now on parole. Therefore, the redressability analysis that applies in set-aside cases does not apply here.[8]

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8. The majority cites *Settles v. U.S. Parole Com'n*, 429 F.3d 1098 (D.C.Cir.2005), in support of its assertion that the jurisdictional framework set forth in racial set-aside cases applies in Townes' case and supports finding that this action is still live. *Maj. Op.*, at 548-49 n. 2. However, the mootness analysis that the D.C. Circuit applied in *Settles* is entirely different than

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The majority also asserts that *FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), supports its new approach to redressability, stating that the *Akins* "Court recognized that . . . a plaintiff can establish redressability without demonstrating that the agency would likely grant the ultimate relief sought." *Maj. Op.*, at 547-48. However, *Akins* did not state that a plaintiff can establish redressability without showing that the agency would likely grant the ultimate relief sought. Rather, when discussing an entirely different Article III requirement—causation—the *Akins* Court stated that the plaintiff's injury was fairly traceable to the agency's determination even though the agency might reach the same decision on remand. *Akins*, 524 U.S. at 25, 118 S.Ct. 1777.

In addition, the majority's reliance on *Fender v. Thompson*, 883 F.2d 303 (4th Cir.1989), does not support the exercise of jurisdiction in this case because, unlike Townes, the petitioner in *Fender* was still in prison when we decided that appeal. Thus, *Fender* provides no basis for exercising jurisdiction over an appeal when the petitioner has been paroled.

(Cont'd)

the analysis that applies here. In *Settles*, the D.C. Circuit determined that the action was "not moot because Settles has not yet been released" from prison. *Settles*, 429 F.3d at 1101. It is precisely because Townes has been released from prison that his appeal is now moot.

2.

Viewing Townes' new argument under the proper redressability standard makes it clear that his claims are moot. Townes has not established (and it is not at all apparent to me) that a decision in his favor (*i.e.* one stating that the Board erred in classifying him as ineligible for parole) would be likely to result in the Board exercising its discretion and shortening his current period of parole.

When the Board classified Townes as ineligible for parole, it made that determination based on its application of Virginia's discretionary parole eligibility statute, which provides that a person shall not be eligible for parole if he has three qualifying convictions. *See* Va.Code Ann. § 53.1-151. In contrast, when determining whether to shorten Townes' parole, the Board must apply its own regulations and weigh entirely different considerations, including the best interests of society.[9] In other words, while the body that determined Townes' eligibility for discretionary parole is the same as the one vested with authority to shorten his current term of parole, the Board's determination in each instance is based on entirely different considerations,

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9. The Board has adopted rules and procedures governing the parole process. *See* Virginia Parole Board Policy Manual (Oct.2006). As relevant here, the Board's guidelines provide that "[t]he Board may terminate active parole supervision pending completion of the parole period at any time upon a finding that such termination would be in the best interest of society and the parolee." *Id.* at 24-25.

and there is simply nothing in the record to support the conclusion that the Board would likely shorten Townes parole if we issued a decision stating that it erred in interpreting and applying Virginia's discretionary parole eligibility statute to Townes. Indeed, there is not even any evidence that the Board would consider the propriety *vel non* of its parole eligibility determination when deter mining whether to shorten Townes' parole.[10]

In short, determining whether Townes' injury is likely to be redressed depends upon choices that would

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10. In determining whether the Board would be likely to reduce Townes' parole if we decided that it erroneously denied him consideration for discretionary parole and thereby possibly extended his period of active incarceration, the Supreme Court's opinion in *United States v. Johnson*, 529 U.S. 53, 120 S.Ct. 1114, 146 L.Ed.2d 39 (2000), is instructive. There, the Court rejected the concept of interchangeability of supervised release and incarceration, holding that a supervised release term begins to run on the day the prisoner is released from prison—not the date on which he lawfully should have been released—because "[s]upervised release fulfills rehabilitative ends, distinct from those served by incarceration," and "[t]he objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release." *Johnson*, 529 U.S. at 59, 120 S.Ct. 1114. This is also apparently true under Virginia law. *See* Virginia Parole Board Policy Manual, at 1. Contrary to the majority's suggestion, *see Maj. Op.*, at 549 n. 3, I discuss *Johnson*, not to establish mootness, but, to illustrate one reason why I believe Townes has not shown that the Board would be likely to shorten his parole if we issued a decision stating that he was erroneously classified as ineligible for discretionary parole.

be made by the Board-an independent actor not before the Court whose exercise of legitimate discretion we cannot presume to control or predict. Indeed, my view is consistent with *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989), where a plurality of justices determined that a party failed to satisfy Article III's redressability requirement. There, the plurality stated that "[w]hether the association's claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id.* at 614, 109 S.Ct. 2037.[11]

III

For the foregoing reasons, I dissent. I would dismiss Townes' appeal as moot and not address the merits of his claims.

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11. This is not to say that the Board's decision to classify Townes as ineligible for parole is necessarily insulated from review. It may be that a court would have jurisdiction to review the Board's determination if Townes brought an action for damages, for example a claim under 42 U.S.C. § 1983. *See Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 248-49 (4th Cir.2005) (holding that former detainee's request for injunctive relief is moot, but his "request for monetary relief is not moot even though [he] has been released from Jail"). Here, however, Townes filed a habeas action, not a claim for damages.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA FILED AUGUST 22, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ACTION NO. 1:04cv582 (CMH/LO)

CARL MELVIN TOWNES,

Petitioner,

v.

LARRY W. JARVIS, *et al.*,

Respondents.

MEMORANDUM OPINION

Petitioner, Carl Melvin Townes, a Virginia inmate proceeding *pro se*, filed this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging his classification as a "parole ineligible inmate" under Virginia Code § 53.1-151(B)(1). On October 4, 2004, respondents filed a Motion to Dismiss. Mr. Townes was given the opportunity to file responsive materials, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), and has filed a response. Accordingly, this matter is now ripe for disposition. For the reasons that follow, Mr. Townes's claim must be dismissed.

Appendix B

I. Background

Virginia Code § 53.1-151(B)(1) provides that "[a]ny person convicted of at least three separate felony offenses of (i) murder, (ii) rape, (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivision (i), (ii), or (iii), when such offenses were not part of a common scheme shall not be eligible for parole."[1] The Virginia Department of Corrections ("VDOC")—the agency charged under Virginia law with managing prisoners and parole eligibility—determined that Mr. Townes was not eligible for discretionary parole after confirming that he committed three qualifying crimes, with different victims, and that were not part of a common scheme. Mr. Townes's three qualifying offenses were as follows:

1. On February 12, 1991, Mr. Townes and two other males robbed an Arby's Restaurant (Chesterfield County) using a .22 caliber pistol and demanding and taking money from a restaurant clerk. Mr. Townes was later convicted of robbery on December 13, 1991, in the Circuit Court for Chesterfield County and sentenced to 20 years, with 12 years suspended. At the same time, Mr. Townes was also convicted of the use of a firearm in the commission of a felony and

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1. In order for Virginia Code § 53.1-151(B)(1) to apply, all crimes must have occurred after the enactment of the statute, which took place on July 1, 1982.

was sentenced to two years to be served consecutively.

2. On February 4, 1991, Mr. Townes and another male robbed a Pizza Hut Restaurant (Mechanicsville, Hanover County, Virginia) using a small handgun, and took $370.00 from the cash register. The perpetrators tried to take additional money from the safe but left before the safe was opened. Subsequently, Mr. Townes was convicted of robbery on February 19, 1992, in the Circuit Court for Hanover County and sentenced to 50 years with 30 years suspended. He was also convicted of the use of a firearm in the commission of a felony and was sentenced to two additional years.

3. On February 14, 1991, Mr. Townes robbed a Subway Restaurant (Richmond, Virginia), while using a .38 revolver/ handgun, and took $133.00. He was convicted of the robbery in the Circuit Court for the City of Richmond on October 7, 1991, and sentenced to a four-year indeterminate sentence with placement in the Youthful Offender Program. The Circuit Court later amended the sentence on July 7, 1992, because Mr. Townes was ineligible for parole. His sentence was then suspended.

Appendix B

Following his three convictions, Mr. Townes was committed to the custody of the VDOC on March 10, 1992, to begin his active sentence of 32 years. Afterwards Mr. Townes appealed VDOC's determination to the Virginia Parole Board, which upheld the decision on August 7, 2003. At this time, he has an anticipated mandatory parole release date of May 22, 2008.

On September 2, 2003, Mr. Townes filed a habeas corpus petition in the Supreme Court of Virginia, which dismissed the petition as frivolous on November 5, 2005. *Townes v. Dir. of the Dep't of Corr.*, R. No.032123 (Va. Nov. 5, 2003). On or about May 4, 2004,[2] Mr. Townes filed the instant federal habeas corpus petition raising the following claims:

> A. His February 14, 1991 conviction should not count as one of the three offenses to satisfy Virginia Code § 53.1-151(B)(1) because he was not convicted of "presenting of firearms or other deadly weapon" with the robbery.[3] Moreover, the

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2. For purposes of calculating the statute of limitations, a petition is deemed filed when the prisoner delivers his pleading to prison officials. *Lewis v. City of Richmond Police Dep't*, 947 F.2d 733 (4th Cir. 1990; *see also Houston v. Lack*, 487 U.S. 266 (1988). It is unclear when Mr. Jones actually filed his petition but it was received at the Court on May 17, 2004. As it is clear Mr. Jones is not time-barred, the Court will not inquire any further into this issue.

3. For the sake of clarity, the Court consolidates Mr. Townes's self-titled claims A and C into one claim as they present essentially the same argument.

Commonwealth took the position at trial that Mr. Townes did not use a firearm when it failed to prosecute him for a firearm offense as in the two earlier cases.[4]

B. His crimes were part of a "common scheme" and should have been treated as one offense, rather than three separate offenses. The Virginia Parole Board violated the Equal Protection Clause when it classified a white female's eight-day escapade involving four armed robberies with a broken or toy pistol as one scheme, but classified Mr. Townes's three robberies over approximately 10 days as three separate offenses.[5]

Mr. Townes seeks relief that he be declared parole eligible, granted a parole hearing, or in the alternative released on parole. On February 17, 2005, respondents filed a Motion to Dismiss, and Mr. Townes has filed a response. Accordingly, this matter is now ripe for review.

In the Motion to Dismiss, respondent concedes that Mr. Townes has properly exhausted his claim before the

---

4. According to the Circuit Court's June 19, 1991 conviction order, the firearm count of the indictment was *nolle prosequied*.

5. On the specifics of the "deliberate discrimination," Mr. Townes argues "Ms. Kennon's crimes have received different treatment from Petitioner's crimes. Petitioner was a 16 year old, black male from the projects in Richmond while Ms. Sue Kennon[, the other prisoner,] is a white, middle-class female."

Supreme Court of Virginia, even though the Supreme Court of Virginia provided no explanation or details in its dismissal order.[6] Accordingly, we may review Mr. Townes's claim on the merits.

II. Standard of Review

Mr. Townes's claim must be reviewed on the merits under the standard set forth in 28 U.S.C. § 2254(d). When a state court has addressed the merits of a claim raised in a federal habeas petition, a federal court may not grant the petition based on the claim unless the state court's adjudications are contrary to, or an unreasonable application of, clearly established federal law, or are based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). The evaluation of whether a state court decision is "contrary to" or "an unreasonable application of" federal law is based on an independent review of each standard. *See Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court determination meets the "contrary to" standard if it "arrives at a conclusion opposite to that reached by [the United

---

6. *See Parker v. Angelone*, 959 F. Supp. 319, 320 (E.D. Va. 1997) ("[A] decision by a state court summarily dismissing a petitioner's claim as "frivolous" is an adjudication on the merits within the meaning of 28 U.S.C. § 2254(d). As such, the petitioner's subsequent application in federal court for a writ of habeas corpus can only be granted if that state adjudication '(1) resulted in a decision that was contrary to . . . clearly established Federal law . . . or (2) resulted in a decision that was based on an unreasonable determination of the facts . . .' 28 U.S.C. § 2254(d).").

States Supreme] Court on a question of law or if the state court decides a case differently than [the United States Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413. Under the "unreasonable application" clause, the writ should be granted if the federal court finds that the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Moreover, this standard of reasonableness is an objective one. *Id.* at 410.

III. Merits

A. Claim A

In Claim A, Mr. Townes alleges that he did not commit three offenses as per Virginia Code § 53.1-151(B)(1) because the three crimes were part of a common scheme and he was not convicted of a firearm offense with one of the crimes. As such, he claims § 53.1-151(B)(1) is inapplicable and the VDOC incorrectly declared him as parole ineligible. In reviewing this claim, the Virginia Supreme Court held that Mr. Townes's argument was frivolous, and this Court reaches the same conclusion. Although Mr. Townes has proffered neither additional evidence in support of his claim nor any showing that the Virginia Supreme Court's decision involved an objectively unreasonable application of federal law, the Court will briefly review the reasonableness of the Virginia Supreme Court's decision.

Appendix B

The specific issue raised in claims A and B appears to be whether the trial court violated Virginia law in assigning different judges to the 1999 and 2003 sentence hearings. It is well established that this Court's scope of review is limited to questions of either the federal Constitution or laws, and it may not reexamine a state court's interpretation and application of a state law, such as the procedural rule in the instant claim. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Wright v. Angelone*, 151 F.3d 151, 157 (4th Cir. 1998). Questions of parole eligibility are strictly matters of state law and are not cognizable on federal habeas review. *See Ramdass v. Angelone*, 187 F.3d 396, 405 (4th Cir. 1999). Moreover, the Fourth Circuit has held that it is not the role of this Court to determine, or even second-guess, what constitutes a "common scheme,"[7] or "robbery by

---

7. A "common scheme" exists in Virginia when the crimes occur over the course of hours, the same weapon is used, there is a connection between the victims. *See e.g., Fitzgerald v. Commonwealth*, 455 S.E.2d 506, 510 (Va. 1995) (defendant, in retaliation for a spurned ex-lover, kidnapped a girl, robbed and murdered her father, drove the girl to the woods and raped her, then took a taxi cab to a second woman's home after killing the taxi cab driver, and kidnapped and raped the second woman after taking her to a hotel—all of the victims were related in some form to the ex-lover); *see also Clagett v. Angelone*, 209 F.3d 370, 376 (4th Cir. 2000) (finding no "common scheme" under Virginia law when defendant murdered four people on the same night within minutes of each other, in the same bar, during the same robbery, with the same gun and the same accomplice). In applying Virginia's "common scheme" standard to the facts of this case, it is irrational to argue Mr. Townes's crimes were part

(Cont'd)

the presenting of firearms or other deadly weapon",[8] as provided under Virginia law and affirmed by the Supreme Court of Virginia. *See id.* at 407. As this federal Court's review is limited only to federal questions and Mr. Townes does not raise any federal constitutional matter in claim A, such claim must be dismissed.[9]

(Cont'd)

of a single scheme or act. Specifically, the crimes took place over fourteen days, occurred in three different counties, and involved different victims and perpetrators ranging from three to just Mr. Townes. In short, the only similarities between these offenses is that they were all robberies of restaurants involving Mr. Townes and the use of, albeit different, a firearm. Thus, even though Mr. Townes has identified no federal law even suggesting that the Supreme Court of Virginia could not reasonably conclude his crimes were not part of a "common scheme," Virginia law supports the conclusion that the three robberies were separate offenses, and should constitute three strikes for the purposes of Virginia Code § 53.1-151(B)(1).

8. It is noteworthy that Mr. Townes's main argument is that he was never convicted of using a firearm in the commission of the third robbery, yet the text of the parole eligibility statute requires only "robbery by the presenting of firearms or other deadly weapon." Equally detrimental to Mr. Townes's argument is that he does not dispute that he used a firearm in his third robbery, only that he was not *convicted* of the use of a firearm. The record, and specifically the presentence report, clearly supports the fact that Mr. Townes used a firearm in the commission of the robbery on February 14, 1991. As such, it is clear from the plain text of the statute that Mr. Townes, in fact, did commit the third "robbery by the presenting of firearms or other deadly weapon."

9. To the extent that Mr. Townes argues a violation of Due Process by the Virginia Parole Board in upholding his parole

(Cont'd)

Appendix B

B. Claim B

In claim B, Mr. Townes argues the Virginia Parole Board violated the Equal Protection Clause by treating his three crimes as not part of a "common scheme" but treating a white woman's four robberies as a single scheme. Thereby, the Virginia Parole Board was able to classify Mr. Townes as "parole ineligible" but did not classify the woman as such. As with claim A, the Supreme Court of Virginia dismissed this claim as frivolous, and this Court reaches the same conclusion. In support of his equal protection argument, Mr. Townes has failed to proffer even a factual basis to suggest that the Virginia Parole Board violated Mr. Townes's rights, nor has he provided any showing that the Virginia Supreme Court's decision involved an objectively unreasonable application of federal law.

The Equal Protection Clause of the Fourteenth Amendment protects against arbitrary classifications by

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(Cont'd)

ineligible determination, his claim is unfounded. To satisfy due process requirements, prisoner administrators need only find "some evidence" on the record to support a finding affecting an inmates' prospective release from confinement. *See Superintendent v. Hill*, 472 U.S. 445, 455-56 (1985). The information available to VDOC, be it Mr. Townes's conviction and sentencing orders or his presentence reports, provided more than "some evidence" than he committed three separate robberies involving a firearm. As such, VDOC's decision that Mr. Townes should be declared parole ineligble under the standards of Virginia Code § 53.1-151(B)(1) comported with due process.

state actors. *See* U.S. Const. amend. XIV § 1. Although the Equal Protection Clause of the Fourteenth Amendment protects prisoners from discriminatory treatment by prison officials, prisoners are not a suspect class, which would entitle them to the highest level of scrutiny by the courts. *See Roller v. Gunn*, 107 F.3d 227, 233 (4th Cir. 1997); *Moss v. Clark*, 886 F.2d 686, 690 (4th Cir. 1989). Instead, a prisoner must show in a successful claim that the action in question does not serve a legitimate state interest and the action is not rationally related to the legitimate state interest. *See id.* at 692. In addition, a prisoner must make a threshold showing "that he was treated differently from others who were similarly situated." *Shaheed v. Winston*, 885 F. Supp. 861, 869 (E.D. Va. 1995), *aff'd*,161 F.3d 3 (4th Cir. 1998) (unpublished).

Mr. Townes has failed to adduce facts sufficient to state a claim of discriminatory treatment in violation of the Fourteenth Amendment because he has not asserted that he was similarly situated to any other prisoner for the purposes of determining parole eligibility. His only allegation is that another prisoner, Sue Kennon—a white female from an affluent area who committed four robberies in eight days—was deemed parole eligible after her four robberies were treated as a common scheme. Mr. Townes provided no additional facts concerning Ms. Kennon's crimes, such as factors that may have linked her crimes as one continuous criminal action. On the other hand, Mr. Townes avers that he was treated differently than Ms. Kennon. Specifically, he argues that as a black, 16 year old male from a poor,

inner-city neighborhood, he committed three robberies with a firearm over 10 days but VDOC did not determine these to be part of a common scheme and declared him parole ineligible. Outside of these facts, Mr. Townes provides neither additional information to show his crimes were part of a common scheme nor does he provide enough detail about Ms. Kennon's crimes to allow a thorough comparison between these two parole eligibility determinations.[10] In light of the myriad of factors involved in a parole decision, "[I]t is difficult to believe that any two prisoners could ever be considered 'similarly situated' for the purpose of judicial review of an equal protection claim." *See Refitt v. Nixon*, 917 F. Supp. 409, 414 (E.D. Va. 1996) (citations omitted). Moreover, it is not the role of this Court to second-guess determinations of state law, such as what constitutes a "common scheme" for the purposes of parole eligibility. *See supra* III.A. Because Mr. Townes provides insufficient facts to assert even a prima facie equal protection argument, he cannot show that the Supreme Court of Virginia's decision was objectively unreasonable, and claim B must also be dismissed.

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10. It appears that Mr. Townes's sole source for information on Ms. Keenon's case is a newspaper article discussing the need for reform of the three strikes provision of Virginia Code § 53.1-151(B)(1).

IV. Conclusion

For the reasons stated above, this petition must be dismissed. An appropriate Order shall issue.

Dated: August 22, 2005
Alexandria, Virginia

s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ACTION NO. 1:04cv582 (CMH/LO)

CARL MELVIN TOWNES,

Petitioner,

v.

LARRY W. JARVIS, *et al.*,

Respondents.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that respondents' Motion to Dismiss is **GRANTED** and this petition is **DISMISSED.**

Should petitioner wish to appeal, petitioner must file a notice of appeal within thirty (30) days of the date of this Order. Petitioner must also request a certificate of appealability from a circuit justice or judge. *See* 28 U.S.C. § 2253 and Fed. R. App. P. 22(b). For reasons stated in the accompanying Memorandum Opinion, this Court expressly declines to issue such a certificate.

Appendix B

The Clerk is DIRECTED to send a copy of this Order to petitioner and counsel of record for respondents.

Dated: August 22, 2005
Alexandria, Virginia

s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

APPENDIX C — PAROLE BOARD OPINION DATED AUGUST 7, 2003

COMMONWEALTH OF VIRGINIA
Virginia Parol Board
6900 Atmore Drive
Richmond, Virginia 23225
V/TDD (804) 674-3081
FAX (804) 674-3284

August 7, 2003

Mr. Carl M. Townes, No. 193004
Bland Correctional Center
Route 2
Bland, Virginia 24315

Dear Mr. Townes:

The Virginia Parole Board has reviewed your appeal of Parole Ineligibility in accordance with the provisions of Section 53.1-151(B1) and has determined you to be ineligible for parole as determined by the Department of Corrections.

Sincerely,

s/ David N. Harker
David N. Harker
Vice-Chairman

APPENDIX D — STATE SUPREME COURT OPINION DATED NOVEMBER 5, 2003

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 5th *day of* November, 2003.

No. 193004,

Record No. 032123

Carl Melvin Townes,

Petitioner

against

Director of the Department of Corrections,

Respondent.

Upon a Petition for a Writ of Habeas Corpus

On consideration of this case, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. It is therefore ordered that the said petition be dismissed as frivolous.

A Copy,

Teste:

Patricia H. Krueger, Clerk

By: s/ [illegible]
Deputy Clerk

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
09-729 DEC 17 2009
OFFICE OF THE CLERK

(4)

No 09-

IN THE
Supreme Court of the United States

CARL MELVIN TOWNES,

Petitioner,

v

LARRY W JARVIS, Warden,
GENE M JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

JUSTIN S ANTONIPILLAI
Counsel of Record
JOHN A RACKSON
ADAM J REINHART
ROBERT A STOLWORTHY, JR
ARNOLD & PORTER, LLP
555 Twelfth Street, NW
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Counsel for Petitioner

227007

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V Hilton (A)

AO 241
REV 4/82

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

7:04CV00245

United States District Court	District: Western District, Roanoke Division	
Name: Carl Melvin Townes	Prisoner No: #193004	Docket No: CLERK'S OFFICE U.S. DIST. COURT ROANOKE, VA FILED

Place of Confinement: Bland Correctional Center

MAY 17 2004
JOHN F CORCORAN, CLERK
BY: DEPUTY CLERK

Name of Petitioner (include name under which convicted): Carl Melvin Townes VSP #193004

Name of Respondent (authorized person having custody of petitioner): Gene Johnson, Director-Virginia Department of Corrections
V. Larry W. Jarvis, Warden-Bland Correctional Center

The Attorney General of the State of: Virginia, Jerry W. Kilgore

PETITION

1 Name and location of court which entered the judgment of conviction under attack: Circuit Court of Richmond (Manchester), 10th & Bull Street, Richmond, Virginia 23224 (see attachment)

2 Date of judgment of conviction: (Richmond) 10-7-91, (Chesterfield) 12-13-91, (Hanover) 2-19-92

3 Length of sentence: (Richmond) 4 years, (Chesterfield) 20 years w/12 years suspended (see attachment)

4 Nature of offense involved (all counts): (Richmond) Robbery /use of a firearm (nolle prosequied), (Chesterfield) Robbery /use of a firearm, (Hanover) Robbery /use of a firearm

5 What was your plea? (Check one)
(a) Not guilty ☐
(b) Guilty ☒
(c) Nolo contendere ☐
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details.

6 Kind of trial (Check one)
(a) Jury ☐
(b) Judge only ☒

7 Did you testify at the trial?
Yes ☐ No ☒

8 Did you appeal from the judgment of conviction?
Yes ☐ No ☒

RECEIVED
MAY 17 2004
STAFF ATTORNEY
RICHMOND VA

SA2

AO 241
REV 6/82

9 If you did appeal answer the following.

(a) Name of court N/A

(b) Result

(c) Date of result

(d) Grounds raised

10 Other than a direct appeal from the judgment of conviction and sentence have you previously filed any petitions applications or motions with respect to this judgment in any court state or federal?
Yes ☒ No ☐

11 If your answer to 10 was "yes" give the following information.

(a) (1) Name of court Supreme Court of Virginia

(2) Nature of proceeding Parole Eligibility

(3) Grounds raised a. Violation of Virginia Code § 53.1-151 (B1), by the Virginia Department of Corrections and Virginia Parole Board.

b. Violation of ~~equal protection~~ (Sue Kennon) case.

c. Violation of due process

(4) Did you receive an evidentiary hearing on your petition application or motion?
Yes ☐ No ☒

(5) Result Dismissed as frivolous

(6) Date of result November 5th, 2003

(b) As to any second petition application or motion give the same information

(1) Name of court Supreme Court of Virginia

(2) Nature of proceeding "Writ of Mandamus", to have the Virginia Parole Board answer my appeal concerning parole eligibility.

SA3

AO 241

(3) Grounds raised Parole eligibility / Virginia Parole Board and Virginia Department of Corrections characterization of petitioner's three robberies as being three robberies by the use of a firearm.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Dismissed

(6) Date of result October 15th, 2003

(c) As to any third petition, application or motion, give the same information.
(1) Name of court N/A

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result N/A

(6) Date of result

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☐ No ☒
(2) Second petition, etc. Yes ☐ No ☒
(3) Third petition, etc. Yes ☐ No ☒

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

I did not appeal because it was (dismissed) as being frivolous, and I wanted to research it a little more to make sure that I had not missed any important issues that may be helpful in my habeas corpus proceedings.

12 State concisely every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

BEST AVAILABLE COPY

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AO 241
REV 6/82

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you *should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Violation of petitioner's due process (also see attached-memorandum)

Supporting FACTS (tell your story *briefly* without citing cases or law). Petitioner's 14th Amendment rights were violated when the Virginia Parole Board and the Virginia Department of Corrections declared him ineligible for parole consideration. Virginia Code § 53.1-151 (B1) considers three (3) convictions for robbery by the use of a firearm and the three (3) convictions [not] be part of a common scheme. Petitioner does not meet either criteria.

B. Ground two: Violation of petitioner's equal protection of law (also see attached memorandum)

Supporting FACTS (tell your story *briefly* without citing cases or law) Petitioner's 14th Amendment rights were violated in that the Virginia Parole Board does not apply the same standard to its classification. In a similar case, (Sue Ka-son), a white upper-middle-class woman in similar circumstances and facts was given consideration not given to this black male from the projects of Richmond, who was only 16 years old when committing his crimes.

(5)

SA5

AO 241
REV 6/82

C Ground three: Violation of the seperation of powers act (also see attached-
memorandum)

Supporting FACTS (tell your story *briefly* without citing cases or law) The Virginia Department of Corrections and the Virginia Parole Board is in clear violation of the seperation of powers act because of their arbitrary and capricious deprivation of due process and equal protection of law in their classification of petitioner as being not eligible for parole consideration.

The doctrines of collateral estoppel and res judicata apply to this case.

D Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law) _____

13 If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reason for not presenting them: _____

N/A

14 Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15 Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein

(a) At preliminary hearing N/A

(b) At arraignment and plea N/A

SA6

(c) At trial N/A

(d) At sentencing N/A

(e) On appeal N/A

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding

16 Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☒

17 Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒
(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

N/A
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

May 4th, 2004
(date)

Carl M. Townsend
Signature of Petitioner

SA7

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DIVISION OF ROANOKE

ROANOKE DIVISION

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA
FILED

MAY 11 2004

JOHN F. CORCORAN, CLERK
BY
DEPUTY CLERK

7:04CV00245

MEMORANDUM/ATTACHMENT

IN SUPPORT OF

PETITION FOR WRIT

OF HABEAS CORPUS

Date: May 4, 2004
Carl Malvin Townes
Bland Correctional Center
Route 2, Box 143
Bland, Virginia 24315

RECEIVED
MAY 17 2004
STAFF ATTORNEY
RICHMOND, VA

SA8

Carl M. Townes

Petitioner for Writ of Habeas Corpus

Memorandum/Attachment

From Page 2

ANSWERS TO QUESTIONS

Question #1:

Name and location of court which entered judgment under attack?

Answer to Question #1 from page 2:

b. Chesterfield Co. Circuit Court, P.O. Box 125, Chesterfield, Virginia 23832

c. Hanover Co. Circuit Court, P.O. Box 39, Hanover, Virginia 23069

Question #3:

Length of sentence?

Answer to Question #3 from page 2:

b. (Chesterfield) plus 2 years for use of a firearm

c. (Hanover) 50 years w/30 years suspended, plus 2 years for use of a firearm

SA9

Carl M. Townes

Petition for Writ of Habeas Corpus

Memorandum/Attachment

STATEMENT OF FACTS

Carl Melvin Townes, the Petitioner, has been incarcerated since February 14, 1991. He was sentenced October 7, 1991 in the Richmond City Circuit Court on one count of robbery to 4 years with one count of use of a firearm being nol prossed; sentenced on December 13, 1991 in Chesterfield County Circuit Court on one count of robbery to 20 years, 12 suspended and one count of use of a firearm in a robbery for 2 years, and sentenced on February 19, 1992 in Hanover County Circuit Court on one count of robbery for 50 years, 30 suspended and one count of use of a firearm during a robbery to 2 years. [See Exhibit A]

Petitioner, over the years, has sent multiple requests for parole eligibility to the Virginia Department of Corrections to no avail. However, he was informed that he could file an appeal of parole ineligibility to the Virginia Parole Board ("Board").

On March 5, 2002, Petitioner filed an "Appeal of Parole Ineligibility" to the Board On June 30, 2003, after having to attempt to file a "Writ of Mandamus", the Board, not the Court, responded on August 7, 2003, and denied relief from VDOC's characterization of his three robberies as being robberies by use of a firearm [See Exhibit B] On September 2, 2003, Petitioner filed a habeas corpus to the Virginia Supreme Court seeking relief and it was dismissed as frivolous on November 5, 2003. [See Exhibit C]

SA10

ARGUMENT

The Virginia Department of Corrections (VDOC) and the Board's decision to deny Petitioner parole eligibility is arbitrary and capricious; a deprivation of due process; and a deprivation of equal protection of laws. The Board applies it's discretion, arbitrarily and capriciously, in an inconsistent manner where there is a difference in race and class: Petitioner's case v. Ms. Kennon's case. Moreover, the VDOC and Board violated the Petitioner's constitutional rights by declaring him to have been convicted of three (3) robberies by use of a firearm when the sentencing court nol prossed the firearm charge from the Circuit Court of the City of Richmond, Manchester Courthouse on June 21, 1991. The Board may lawfully deny parole for almost any reason, however, it cannot lawfully deny parole eligibility contrariwise from the sentencing order. Due process requires that Petitioner be heard and have the opportunity to present evidence on his behalf prior to the executive branch finding him guilty of a crime the sentencing court dismissed.

Ground A.

Virginia Code Section 53.1-151(B)(1) provides in relevant part, "[a]ny person convicted of three seperate felony offenses... robbery by the presenting of firearms or other deadly weapon....when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole." Id. [Emphasis Added] Petitioner has [not] been convicted of three robberies by the presenting of firearms or other deadly weapon. [See again, Exhibit A]

Ground B.

The Virginia Parole Board in the case of a white, middle class female, Sue Kennon, who had committed four robberies in 1987 over a period of eight days, was classified by the Board as eligible for parole in that her crimes should be considered as a single criminal act. Petitioner's robberies were "common scheme". The crimes took place in a 10 day period as one continuing plan.

SA11

The arbitrary and capricious refusal of the Board to grant Petitioner the same form of consideration can be seen as deliberate discrimination Ms. Kennon's crimes have received different treatment from Petitioner's crimes. Petitioner was a 16 year old, black male from the projects in Richmond while Ms. Kennon is a white, middle-class female. This violates the equal protection of law as guaranteed by the 14th Amendment of the United States Constitution. [See Exhibit D]

Ground C.

Petitioner pled guilty to [the] robbery in the Circuit Court of Manchester in Richmond, Virginia on June 21, 1991. The court did [not] find him guilty of using a firearm in the commission of a robbery in Richmond City Circuit Court. Petitioner has passed his discretionary parole eligibility date without receiving a parole hearing. Moreover, the Sentencing Court made it clear in the Petitioner's sentencing order that the use of a firearm charge was nol prossed. [See again, Exhibit A]

The VDOC and Board are collateral estopped and/or res judicata from finding a conviction for use of a firearm included within Petitioner's conviction of common law robbery. The VDOC and board are a part of the executive branch of government with the Board having quasi-judicial powers in granting or denying parole or revoking the same The position taken by the Commonwealth was no firearm was used in the Richmond robbery. The Commonwealth was represented by the Commonwealth Attorney and the Court is a part of the Judicial Branch of government. Petitioner claims that the VDOC and Board have violated his procedural and substantive due process rights of the 5th and 14th Amendment of the United States Constitution.

SA13

'Ohio has changed ... and her attitudes toward them dangerous and has never altered her position'

Convicted killer finds unlikely allies

Ellin R. Crawford talks about efforts to get out of prison as her attorney, Del. Dick Black, R-Loudoun County sits with her in July at the Governor's Correctional Center for Women in Troy

EXHIBIT D

BEST AVAILABLE COPY

Kaine told Gov Mark Warner in a May 16 letter that Crawford's case "merits special attention from your office," although the lieutenant governor is not taking a position on whether or not she should be freed.

Said Jenkins: "I would very much like to see Ollin Crawford released. At $26,000 a year it is absolutely doing the commonwealth no good to continue to incarcerate her. The mistakes she made years ago she has well paid for."

Black believes 18 years in prison is enough for a series of bank robberies in which no one was injured and no weapon was displayed. In every robbery, a slim young woman strolled into the bank wearing sunglasses, a baggy gray sweater and a stylish gray beret. In her left hand she held a brown sock that bulged with a lemon-shaped object that she said was a hand grenade. It was never determined what was in the sock, Black said.

Black said Crawford's case is strikingly similar to that of Sue Kennon, an upper-middle-class housewife [illegible] with a broken toy pistol before she was shot and wounded by a Suffolk pharmacist who tried to rob [illegible] Kennon in December 1981, after [illegible] Crawford, the state [illegible] Corrections Department [illegible] that [illegible] Kennon was [illegible] Earlier [illegible] committed [illegible] Crawford's over-the-[illegible] Kennon, was sentenced to 48 years. Crawford, to 70. Crawford's ransom in the robberies was $10,000.

Kennon is white and came from an affluent Chesapeake neighborhood. Crawford was a black woman from Washington, D.C., who was working as a department store cashier when she was arrested in October 1984.

Neither Crawford nor Black believes Kennon was denied parole because she is white. "I don't believe there was deliberate discrimination, but reasonable people might ask why a poor black woman hasn't received the same consideration as an affluent white woman," Black said. "We do know that two women with very similar cases received vastly different treatment."

The judge who presided over Crawford's trial and sentenced her said he had no objection to her being considered for discretionary parole.

"I did not intend myself that she be ineligible for parole," Fairfax Circuit Judge Howe Brown wrote the state Parole Board in July 1992.

Black has asked Warner, a Democrat, to grant clemency that would allow the Parole Board to consider Crawford for discretionary release. Her mandatory parole date is Feb. 7, 2021.

"I hope the governor says it is equitable to release Ollin the way Sue was released," said Black, who represents Crawford free of charge.

Warner spokesman Kevin Hall said the governor's office is looking into the Crawford case.

Black made the same request to former Republican governors George Allen and Jim Gilmore, but his timing was bad. Allen was elected on a platform of abolishing parole. Gilmore's parole board came under fire during his final month in office after it paroled a murderer and a man convicted of masterminding a murder-for-hire scheme. Warner fired the entire board, including Jenkins, who voted against the paroles.

Crawford has refused to admit guilt or express remorse for the robberies.

Asked during an interview at the Fluvanna Correctional Center for Women whether she wanted to acknowledge guilt, she hesitated, then deferred to Black sitting next to her.

"Ollin has always maintained her innocence and has never altered her position in the slightest," Black said.

Said Crawford: "Whether I did it or didn't do it, 18 years for a first-time felon ... is a bit excessive." She was convicted on four counts of robbery and three of attempted robbery.

Jenkins was no friend of criminals during his tenure as Parole Board chairman. The board had a parole grant rate of 2 percent for violent offenders and 6 percent for nonviolent criminals.

But he said something needs to be done about the three-time-loser law, perhaps expanding to three or six months the period for which a series of crimes can be considered a common scheme.

In its final month, the Jenkins board overturned the [illegible] of [illegible] Kennon and [illegible] [illegible] But the board denied parole to Crawford.

"Our concern with that case was that the board had not sat down to establish a new criteria for someone like Crawford, whose crimes were committed over two months. "There was some concern over whether we were pushing into an area the legislature should address," he said.

Like Kennon, who earned a college degree in prison, Crawford has taken college courses and is one year away from earning a bachelor's degree in sociology. She also has become a certified paralegal while in prison.

Crawford has been a model prisoner who has trained other inmates for discharge back into society, Black said.

Fairfax Commonwealth's Attorney Robert Horan, whose office prosecuted Crawford, did not respond to three phone messages seeking comment on whether she should be released.

Black retired as an Army colonel in 1994 after heading the Army's Criminal Law Division at the Pentagon. He prosecuted dozens of cases himself and supervised as many as 2,000 prosecutions during his military career.

"There is probably no more staunch supporter of harsh punishment for violent criminals," he said. "But justice requires mercy in appropriate cases."

No. 09-729

Supreme Court, U.S.
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In The
Supreme Court of the United States

CARL MELVIN TOWNES,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the court below err in concluding that the decision of the state court was neither contrary to, nor an unreasonable application of, clearly established precedent from this Court when the petitioner alleged no facts supporting the contention that the Virginia Parole Board intentionally discriminated against him on the basis of race?

Is there a division among the circuits on the proper pleading standard in intentional discrimination cases?

Is this case moot when the petitioner attacked a finding that he was ineligible for discretionary parole, but he was released on mandatory parole during the pendency of the appeal?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 7

I. THE DISTINCT PLEADING RULES THAT APPLY IN THE HABEAS CONTEXT RENDER THIS CASE A POOR VEHICLE FOR RESOLVING NOTICE PLEADING ISSUES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE 8

II. THERE IS NO CONCRETE DIVISION AMONG THE CIRCUITS ON WHAT A PLAINTIFF WHO ALLEGES INTENTIONAL DISCRIMINATION MUST STATE IN HIS RULE 8 COMPLAINT TO SURVIVE A MOTION TO DISMISS 12

III. A MOOT CASE DOES NOT MERIT REVIEW BY THIS COURT 13

IV. THE STATE COURT PROPERLY DISMISSED THE PETITION AS FRIVOLOUS 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8 (D.C. Cir. 2008) 11

Al Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009) 11

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 13

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 12

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 12

Boykin v. KeyCorp, 521 F.3d 202 (2nd Cir. 2008) 11

Brown v. Budz, 398 F.3d 904 (7th Cir. 2005) 11

Burkey v. Marberry, 556 F.3d 142 (3rd Cir.), *cert. denied* 130 S. Ct. 458 (2009) 14

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 15

Conley v. Gibson, 355 U.S. 41 (1957) 8

Fowler v. UPMC Shadyside, 578 F.3d 203 (3rd Cir. 2009) 11, 12, 13

TABLE OF AUTHORITIES – Continued

Page

Illinois v. Allen,
397 U.S. 337 (1970) 9

Johnson v. Zerbst,
304 U.S. 458 (1938) 9

Jones v. Bock,
549 U.S. 199 (2007) 9

Jordan v. Alternative Resources Corp.,
458 F.3d 332 (4th Cir. 2006) 12

Levine v. Apker,
455 F.3d 71 (2nd Cir. 2006) 14

Lindsay v. Yates,
498 F.3d 434 (6th Cir. 2007) 11

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 13

Mayle v. Felix,
545 U.S. 644 (2005) 8

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 10

Mujahid v. Daniels,
413 F.3d 991 (9th Cir. 2005) 14

Plyler v. Doe,
457 U.S. 202 (1982) 15

Ruffin v. Nicely,
183 Fed. App'x 505 (6th Cir. 2006) 11

Spencer v. Kemna,
523 U.S. 1 (1998) 13

TABLE OF AUTHORITIES – Continued

Page

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 7, 10, 11, 12, 13

Tamayo v. Blagojevich,
526 F.3d 1074 (7th Cir. 2008) 11

Williams v. Taylor,
529 U.S. 362 (2000) 10

STATUTES

28 U.S.C. § 2254 ..... 2, 5, 8, 9, 12

28 U.S.C. § 2254(d) 10

Virginia Code § 53.1-151(B1) 2, 15

Virginia Code § 53.1-159 4

RULES

Fed. Rule Civ. Proc. 2(c) 8

Fed. Rule Civ. Proc. 8 ..... 1, 7, 8, 9, 11, 12

Fed. Rule Civ. Proc. 8(a) 8

Fed. Rule Civ. Proc. 8(a)(2) 10

Va. R. Prof. Conduct 1:16(e) 9

Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of the Commonwealth of Virginia, submits this Brief in Opposition to the Petition for Certiorari.[1]

INTRODUCTION

The petitioner purports to identify a division among the circuits with respect to complaints filed under Rule 8 of the Rules of Civil Procedure alleging intentional discrimination. Even if such a division exists, the distinct pleading rules that apply in the habeas context render this case a wholly inappropriate vehicle to reach the issue. Moreover, upon examination, the supposed split in the circuits evaporates. Dicta from one circuit does not constitute a proper division worthy of this Court's review. Finally, the fact that the case is moot and utterly lacking in merit further counsel against granting certiorari.

STATEMENT OF THE CASE

1. Over a span of ten days in 1991, Carl Melvin Townes robbed three Richmond area fast-food restaurants at gunpoint. Pet. App. 34a-35a. He was

[1] On December 29, 2009, this Court extended the time for filing a response to February 22, 2010.

convicted in three separate courts of three counts of robbery and two counts of use of a firearm in the commission of robbery. Pet. App. 34a-35a. In one of Townes's cases, he pled guilty to the robbery in exchange for which the prosecution agreed to drop the attendant firearm charge. Pet. App. 2a. He was sentenced to serve a total active sentence of 32 years. Pet. App. 36a.

2. After the Virginia Department of Corrections determined that Townes was not eligible for parole,[2] Townes appealed to the Virginia Parole Board. Pet. App. 48a. The Parole Board affirmed the decision and deemed him "ineligible for parole." Pet. App. 48a. Townes filed a petition for a writ of habeas corpus in the Supreme Court of Virginia, invoking that Court's original jurisdiction. He alleged, among other things, that the Virginia Parole Board violated his equal protection rights by discriminating against him because of his race. Pet. App. 3a. The court denied the petition, dismissing it as frivolous. Pet. App. 49a.

3. Townes then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of

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[2] Under *Virginia Code* § 53.1-151(B1), "[a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole."

Virginia. Pet. App. 33a. The district court described one of Townes's two claims as follows:

> His crimes were part of a "common scheme" and should have been treated as one offense, rather than three separate offenses. The Virginia Parole Board violated the Equal Protection Clause when it classified a white female's eight-day escapade involving four armed robberies with a broken or toy pistol as one scheme, but classified Mr. Townes's three robberies over approximately 10 days as three separate offenses.

Pet. App. 37a. In support of this allegation, he attached a newspaper article detailing the fact that a white woman named Sue Kennon was released on parole. The newspaper describes that Kennon committed "four armed robberies with a broken or toy pistol." Federal Hab. Pet., Exhibit D. It is not clear whether he attached this article to his state habeas petition. Townes requested that the district court "grant the Petitioner to be eligible for parole consideration;" "Grant the Petitioner a parole hearing;" "ORDER . . . The Board to grant Petitioner a parole; and . . . " "Any other relief that the court may deem to be proper and just." Memorandum in support of Federal Hab. Petition, unpaginated.

The district court, like the Supreme Court of Virginia, found the claim frivolous. Pet. App. 42a. The court observed that "Mr. Townes has failed to proffer even a factual basis to suggest that the Virginia Parole Board violated Mr. Townes's rights, nor has he

provided any showing that the Virginia Supreme Court's decision involved an objectively unreasonable application of federal law." Pet. App. 42a. The court noted that Townes "has failed to adduce facts sufficient to state a claim of discriminatory treatment in violation of the Fourteenth Amendment because he has not asserted that he was similarly situated to any other prisoner for the purposes of determining parole eligibility." Pet. App. 43a. Townes had not provided any additional facts concerning the robberies perpetrated by "a white female from an affluent area." Pet. App. 43a. Because "Townes provides neither additional information to show his crimes were part of a common scheme nor does he provide enough detail about Ms. Kennon's crimes to allow a thorough comparison between these two parole eligibility determinations." Pet. App. 44a. The district court dismissed the petition on August 22, 2005. Pet. App. 46a.

4. Townes appealed to the United States Court of Appeals for the Fourth Circuit. While the appeal was pending, Townes was released on mandatory parole.[3] The Fourth Circuit first concluded that the appeal was not moot, notwithstanding Townes's release on mandatory parole. The court reasoned that "the parole ineligibility finding still may affect the length of his parole." Pet. App. 5a. Therefore, Townes had shown an injury in fact. Pet. App. 5a.

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[3] *See Virginia Code* § 53.1-159.

Furthermore, the court concluded that the Parole Board's initial ineligibility finding "precludes Townes from an opportunity to obtain a shortened period of parole" and, consequently, causation was present. Pet. App. 6a. Finally, the court held that Townes's claim was redressable because, were he to prevail, he would obtain a hearing before the Parole Board and possibly obtain a shorter period of parole. Pet. App. 4a-10a.

The court next turned to the merits of the claim. The court observed that "when a state court has adjudicated a habeas claim on the merits . . . the petitioner must allege facts sufficient to meet the exacting standard set forth in 28 U.S.C. § 2254(d). Pet. App. 14a. The court assumed that Townes had pled "facts sufficient to satisfy the first element of an equal protection claim—unequal treatment of similarly situated persons." Pet. App. 16a. However, Townes "failed to allege facts sufficient to satisfy the second element of such a claim—intentional discrimination." Pet. App. 16a. A petitioner must allege "that the state intended to discriminate against him." Pet. App. 17a. Townes alleged none of the factors that are probative of a discriminatory intent by the decisionmaking body, such as a consistent pattern of discrimination, a history of discrimination, a specific sequence of events leading up to the finding of ineligibility or contemporary statements by Parole Board members manifesting intentional discrimination. This failure to allege any facts

regarding the Parole Board's discriminatory motive was fatal to his claim. Pet. App. 18a.

One member of the panel dissented on the basis that the petition was moot. Pet. App. 19a-32a. The dissent argued that nothing supported the conclusion that Townes's injury—a finding of ineligibility for discretionary parole—could be remedied by the court. Pet. App. 19a-20a. The mere possibility that the parole board would shorten his current term of parole is not redressable, the dissent reasoned, because the standard for redressability is that a decision in his favor would "likely" remedy the injury. Pet. App. 26a. The dissent noted that the decision of *parole ineligibility* was based on the fact that Townes had three qualifying convictions, which precluded discretionary parole. Pet. App. 30a. In contrast, a decision to *shorten parole* is based on separate criteria, including the best interests of society. Pet. App. 30a. The dissent observed that there was no evidence in the record to support the conclusion that the Board would be likely to shorten Townes's parole if the initial decision of parole ineligibility were proved erroneous, or even that the Parole Board would consider the initial parole ineligibility determination at all. Pet. App. 31a.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for four reasons. First, Habeas petitions are governed by distinct and more demanding rules than civil complaints. Therefore, assuming a conflict exists with respect to what a petitioner must allege under Rule 8 of the Federal Rules of Civil Procedure to survive a motion to dismiss, that conflict cannot be resolved in the habeas context.

Second, no conflict exists. The petitioner can only point to one decision that clearly indicates a court of appeals believes this Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) is no longer good law in light of this Court's more recent decisions interpreting Rule 8, and that court indicated its belief in dicta. No Court has squarely held that *Swierkiewicz* is no longer good law.

Third, this case is moot. The petitioner has already received the relief requested in his petition: he was released on parole during this appeal. The petitioner's ability to secure any further relief amounts to nothing more than speculation. This Court will not provide advisory opinions on moot questions.

Finally, as a matter of habeas corpus practice, the petitioner did not demonstrate any intent to discriminate.

I. THE DISTINCT PLEADING RULES THAT APPLY IN THE HABEAS CONTEXT RENDER THIS CASE A POOR VEHICLE FOR RESOLVING NOTICE PLEADING ISSUES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

The petitioner presents this case as an "ideal vehicle" for resolving purported tension between two lines of cases interpreting Rule 8 of the Civil Rules of Procedure. Pet. 24. Federal habeas review of state convictions, however, operates by different rules. Instead of the "notice pleading" of Rule 8, Rule 2(c) of the rules governing § 2254 proceedings applies, and it requires a habeas petitioner to "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground."

As this Court noted in *Mayle v. Felix*, 545 U.S. 644, 655 (2005):

> Under Rule 8(a), applicable to ordinary civil proceedings, a complaint need only provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L. Ed. 2d 80 (1957).
>
> Habeas Corpus Rule 2(c) is more demanding. It provides that the petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." See also Advisory Committee's Note on subd. (c) of Habeas Corpus Rule 2, . . . ("In the past, petitions have frequently

> contained mere conclusions of law, unsupported by any facts. [But] it is the relationship of the facts to the claim asserted that is important. . . ."); Advisory Committee's Note on Habeas Corpus Rule 4, . . . ("'[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." (internal quotation marks omitted)).

There are several reasons for this divergence between ordinary civil cases and habeas cases. For one thing, the reviewing court is not assessing a claim in a vacuum; there is an existing court record that forms the backdrop for review of the habeas claims. The petitioner, of course, has a right to attend his own trial and to consult with his attorney. *See, e.g., Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) (right to be present at trial); *Johnson v. Zerbst*, 304 U.S. 458, 467-69 (1938) (right to confer with counsel). Moreover, the habeas petitioner has a right to demand his attorney's file at the conclusion of the case. *See* Va. R. Prof. Conduct 1:16(e) (specifying that the client has a right to the file, even if the client has not paid the attorney's fee). A regime of notice pleading followed by automatic discovery would be inappropriate for inmate litigants who constantly abuse the criminal justice system. *See Jones v. Bock*, 549 U.S. 199, 203 (2007) (noting that most prisoner cases have "no merit" and "many are frivolous").

Unlike a Rule 8 complaint, the allegations in a § 2254 petition must clear the hurdle imposed by the

Anti-Terrorist and Effective Death Penalty Act. To overcome this hurdle, a habeas petitioner seeking federal review of his state conviction also must state sufficient allegations to demonstrate that the state court decision under review was contrary to, or an unreasonable application of, clearly established precedent from this Court, or the state court's decision was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). *See Williams v. Taylor*, 529 U.S. 362, 405-13 (2000).

Strikingly, the petitioner does not even acknowledge that habeas operates under a different set of pleading rules. In *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508 (2002), this Court framed the issue as follows:

> This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Fed. Rule Civ. Proc. 8(a)(2).

This Court did not (and had no occasion to) address in *Swierkiewicz* what a petitioner seeking federal habeas review of his state conviction must plead in his

habeas petition if the petitioner claims intentional discrimination at the hands of a State. Nor can the Fourth Circuit's decision in this case be construed as addressing any arguable tension between *Swierkiewicz* and more recent decisions construing Rule 8 of the rules of Civil Procedure.

All the cases the petitioner relies on in support of the existence of a circuit split are Rule 8 cases, not habeas cases.[4] Even assuming the existence of a split, given the distinct pleading rules that apply to habeas cases and Rule 8 cases, this is not the proper vehicle to resolve the split.

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[4] *See Boykin v. KeyCorp*, 521 F.3d 202 (2nd Cir. 2008) (complaint alleging violations of Fair Housing Act and other statutes); *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3rd Cir. 2009) (employment discrimination claim under the Rehabilitation Act); *Lindsay v. Yates*, 498 F.3d 434 (6th Cir. 2007) (Rule 8 complaint alleging violations of various statutes following cancellation of real estate contract); *Ruffin v. Nicely*, 183 Fed. App'x 505 (6th Cir. 2006) (alleging various constitutional, statutory, and state-law claims regarding a state refusal to award a grant and contract); *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008) (Rule 8 complaint alleging Equal Pay and Title VII violations); *Brown v. Budz*, 398 F.3d 904 (7th Cir. 2005) (complaint alleging due process violation following beatings by another resident at detention facility); *Al Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) (*Bivens* action for violation of, among other things, Fourth and Fifth Amendment rights); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8 (D.C. Cir. 2008) (trademark infringement case).

II. THERE IS NO CONCRETE DIVISION AMONG THE CIRCUITS ON WHAT A PLAINTIFF WHO ALLEGES INTENTIONAL DISCRIMINATION MUST STATE IN HIS RULE 8 COMPLAINT TO SURVIVE A MOTION TO DISMISS.

In the petitioner's view, "the holdings of the Third and Fourth Circuits" are in conflict "with the holdings of the Second, Sixth, Seventh, and the District of Columbia Circuits." Pet. 22. As for the Fourth Circuit's decision in this case, it did not discuss *Swierkiewicz* and would have had no occasion to do so because, as noted above, it was reviewing a § 2254 complaint, not a Rule 8 complaint. The Fourth Circuit in this case neither cited nor discussed *Iqbal, Twombly* or *Swierkiewicz*. Another Fourth Circuit decision, *Jordan v. Alternative Resources Corp.*, 458 F.3d 332 (4th Cir. 2006), cited by the plaintiff in a footnote, Pet. 17 n.10, was decided before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The Fourth Circuit in *Jordan* in no way questioned the continued validity of *Swierkiewicz*. To the contrary, the panel assumed the continuing validity of that decision. 458 F.3d at 345-46.

As to the Third Circuit, that court did include dicta concluding that *Swierkiewicz* was superseded by *Iqbal* and *Twombly*. *See Fowler*, 578 F.3d at 209-11. In *Fowler*, however, the court *reversed* the district court's grant of a motion to dismiss, holding that the complaint was sufficient under Rule 8. *Id.* at 211. The

division in the Circuits that the petitioner posits is thus purely abstract in character. Whether the dicta in *Fowler* about *Swierkiewicz* will survive in future cases is something best left for the Third Circuit to address. Dicta from one court that contravene holdings of other courts hardly constitute the sort of split that should concern this Court.

III. A MOOT CASE DOES NOT MERIT REVIEW BY THIS COURT.

This Court has explained that the "[r]equisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). The plaintiff bears the burden of establishing (1) an injury-in-fact or continuing collateral consequence; (2) an injury fairly traceable to the challenged action or decision; and (3) that it is *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable federal court decision. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The petitioner attacked the conclusion of the Virginia Parole Board that he was ineligible for parole. He was then released on mandatory parole. Of course, there was no point to granting the petitioner a hearing on his parole eligibility, because he was out on parole. The petitioner's claims and the relief he requested all centered on eligibility for parole.

Clearly, that eligibility was no longer an issue once he was released on parole.

The Fourth Circuit's conclusion that the case is not moot is bottomed on the conclusion that a possibility exists that a favorable judgment in Townes's favor, *i.e.* that the Virginia Parole Board was wrong to conclude that he was ineligible for discretionary parole, might prompt the parole board to reduce his time on parole. Pet. App. 10a. The Guidelines of the Virginia Parole Board permit the early termination of parole "if the Board concludes that the parolee's performance while on parole has been exemplary, and that such placement would be in the interest of society and the parolee." Virginia Parole Board Policy Manual 24 (Oct. 1, 2006).[5] As the dissent pointed out, this sort of speculation does not provide the petitioner with any *likelihood* of redress. The petitioner's release on parole rendered his attack on a determination of parole ineligibility moot.[6]

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[5] The manual is available online at: http://www.vadoc.virginia.gov/vpb/manuals/pb-policymanual-1006.pdf.

[6] As the petitioner notes, there is a conflict of authority on this issue. *Compare Burkey v. Marberry*, 556 F.3d 142, 149-50 (3rd Cir.), *cert. denied* 130 S. Ct. 458 (2009) (speculative nature of possibility of reduction of term of supervised probation does not obviate mootness); with *Levine v. Apker*, 455 F.3d 71, 76-77 (2nd Cir. 2006) (possibility that district court might modify term of supervised release precluded dismissal on mootness grounds); *Mujahid v. Daniels*, 413 F.3d 991, 995 (9th Cir. 2005).

IV. THE STATE COURT PROPERLY DISMISSED THE PETITION AS FRIVOLOUS.

The Equal Protection Clause protects persons who are "similarly circumstanced." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The newspaper article that forms the basis for Townes's assertion of an Equal Protection violation states that Sue Kennon, a "white woman" who was granted parole, committed her robberies using "a broken or a toy pistol." Federal Habeas Pet., Exhibit D. Under *Virginia Code* § 53.1-151(B1), a convict is ineligible for parole if he was convicted of three separate felony offenses of robbery "by the presenting of firearms or other deadly weapon." A toy pistol is not a firearm, nor is a disabled firearm a deadly weapon. It is undisputed that the petitioner employed a real firearm for his robberies. Therefore, the petitioner was not similarly situated to Sue Kennon.

Furthermore, the petitioner must demonstrate that he was treated differently than others similarly situated *and* prove that such treatment resulted from intentional or purposeful discrimination in order to prevail on his equal protection claim. *See, e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985). As the court below found, "Townes sets forth *no facts*—indeed no allegations—supporting the contention that the Board intentionally discriminated against him because of his race, let alone that the state court acted unreasonably in rejecting this claim." Pet. App. 18a. Townes only alleges that

the Parole Board's decision "can be seen" as discrimination—he does not allege that the Parole Board actually discriminated against him. These allegations are woefully insufficient to enable Townes to prevail on an equal protection claim.

CONCLUSION

For the reasons stated above, this Court should **DENY** the Petition for Certiorari.

Respectfully submitted,

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No. 09-729

IN THE

Supreme Court of the United States

CARL MELVIN TOWNES,

Petitioner,

v.

LARRY W. JARVIS, Warden;
GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
I.	THIS CASE PRESENTS AN IDEAL VEHICLE TO REVIEW AN ISSUE ON WHICH THERE IS A SPLIT AMONG THE COURTS OF APPEALS	2
II.	THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE PLEADING STANDARDS FOR INTENTIONAL DISCRIMINATION CASES	7
III.	THIS CASE IS NOT MOOT	8
IV.	THE STATE COURT DID NOT PROPERLY DISMISS MR. TOWNES' PETITION	10
CONCLUSION		13

TABLE OF AUTHORITIES

Cases **Page(s)**

Adams v. Lankford,
788 F.2d 1493 (11th Cir. 1986) 3

Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.,
525 F.3d 8 (D.C. Cir. 2008) 7

Ashcroft v. Iqbal,
__ U.S. __, 129 S. Ct. 1937 (2009) ..... *passim*

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) ..... *passim*

Boykin v. KeyCorp,
521 F.3d 202 (2d Cir. 2008).....7, 8

Breeze v. Trickey,
824 F.2d 653 (8th Cir. 1987) 2

Browder v. Director, Department of Corrections of Illinois,
434 U.S. 257 (1978) 3

Burkey v. Marberry,
556 F.3d 142 (3d Cir. 2009) 10

Conaway v. Polk,
453 F.3d 567 (4th Cir. 2006) 2

Conley v. Gibson,
355 U.S. 41 (1957) 4, 5

Dellenbach v. Hanks,
76 F.3d 820 (7th Cir. 1996) 3

Erickson v. Pardus,
551 U.S. 89 (2007) (per curiam).....12

FEC v. Akins,
524 U.S. 11 (1998) 9

Fowler v. UPMC Shadyside,
578 F.3d 203 (3d Cir. 2009).....8

Hernandez v. Moore,
326 F. App'x 878 (5th Cir. June 18, 2009).....2

Knox v. Wyoming Department of Corrections,
34 F.3d 964 (10th Cir. 1994) 2-3

Kutzner v. Montgomery County,
303 F.3d 339 (5th Cir. 2002) 2

Lindsay v. Yates,
498 F.3d 434 (6th Cir. 2007) 7

Levine v. Apker,
455 F.3d 71 (2d Cir. 2006).....10

Mayle v. Felix,
545 U.S. 644 (2005) 4, 5

Mujahid v. Daniels,
413 F.3d 991 (9th Cir. 2005) 10

Ruffin v. Nicely,
183 F. App'x 505 (6th Cir. May 18, 2006).....7

Swierkiewicz v. Sorema N. A.,
534 U.S. 506 (2002) ..... *passim*

Talbott v. Ferguson,
No. 97-8091, 1998 WL 123061
(10th Cir. Mar. 4, 1998) 2

Tamayo v. Blagojevich,
526 F.3d 1074 (7th Cir. 2008) 7

Wilson v. Workman,
577 F.3d 1284 (10th Cir. 2009) (en banc) 3

STATUTES

22 U.S.C. § 2254 3

OTHER AUTHORITIES

Fed. R. Civ. P. 8 ..... 3, 4, 5

Fed. R. Civ. P. 12(b)(6) 2, 3

Rules Governing § 2254 Cases, Habeas Corpus
R. 2(c), 28 U.S.C. vol. 2, p. 721 ..... 3, 5

This case presents a deep and mature circuit split on the issue of how much factual specificity must be pled in intentional discrimination cases on the element of discriminatory intent. Specifically, this case would permit the Court to address whether *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937 (2009), which require that a complaint set forth sufficient well-pled facts to state a plausible claim, overruled the holding of *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). If *Swierkiewicz* remains good law, as the Second, Sixth, Seventh, and District of Columbia Circuits have held, then Mr. Townes' habeas petition, in which he alleged that the Virginia Parole Board intentionally discriminated against him by declaring him parole ineligible, should not have been dismissed. If, on the other hand, *Swierkiewicz* has been overruled and a plaintiff must allege specific facts demonstrating discriminatory intent, then Mr. Townes' habeas petition would have been properly dismissed. In its Brief in Opposition ("Opp."), Respondent advances four reasons why this Court should deny Mr. Townes' petition for a writ of certiorari, none of which is persuasive nor should prevent this Court from granting Mr. Townes' petition in light of the clear circuit split and the importance of the question presented.

I. THIS CASE PRESENTS AN IDEAL VEHICLE TO REVIEW AN ISSUE ON WHICH THERE IS A SPLIT AMONG THE COURTS OF APPEALS.

Respondent argues that this case does not present an appropriate vehicle for reviewing the question presented – whether the holding of *Swierkiewicz* remains good law after this Court's decisions in *Twombly* and *Iqbal* – because this case involves a federal habeas corpus petition rather than a civil complaint. This argument should not dissuade this Court from granting a writ of certiorari for two reasons.

First, Federal Rule of Civil Procedure 12(b)(6) applies equally to civil complaints and habeas petitions. When a habeas petition is dismissed without an evidentiary hearing or discovery, a court "must evaluate the petition under the standards governing motions to dismiss made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006); *see also Kutzner v. Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002) (affirming dismissal of 42 U.S.C. § 1983 action that court construed as petition for permission to file successive habeas petition under Rule 12(b)(6)); *Hernandez v. Moore*, 326 F. App'x 878, 879 (5th Cir. June 18, 2009) (applying Rule 12(b)(6) to habeas petition); *Breeze v. Trickey*, 824 F.2d 653, 654 (8th Cir. 1987) (affirming dismissal of habeas petition under Rule 12(b)(6)); *Talbott v. Ferguson*, No. 97-8091, 1998 WL 123061, at *2 (10th Cir. Mar. 4, 1998) (same); *Knox v. Wyoming Dep't of Corr.*, 34 F.3d 964, 965, 968 (10th Cir.

1994) (same); *Adams v. Lankford*, 788 F.2d 1493, 1494, 1500 (11th Cir. 1986) (same). Indeed, the Fourth Circuit explicitly applied Rule 12(b)(6) in the decision below, (*see* App. 14a,) and Respondent does not dispute that this was proper.[1]

Second, the pleading standards under Federal Rule of Civil Procedure 8, as interpreted by *Twombly* and *Iqbal*, and Habeas Corpus Rule 2(c) are essentially identical. *See Wilson v. Workman*, 577 F.3d 1284, 1291 (10th Cir. 2009) (en banc) (stating that the *Twombly* pleading standard "is no different in the habeas context"). Under both rules, a complaint/petition must state sufficient facts to state a "plausible" claim. *Compare Iqbal*, 129 S. Ct. at 1949 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " (quoting *Twombly*, 550 U.S. at 570)), *with Dellenbach v. Hanks*, 76 F.3d 820, 822 (7th Cir. 1996) ("[T]he courts require that [a habeas] petition cross some threshold of plausibility before they will require the state to answer."). Under both rules, a complaint/petition must provide more than fair notice of the grounds for relief. *Compare Twombly*, 550 U.S. at 555 n.3 (A complaint must provide more than "fair notice of the nature of the claim" by including "some factual

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[1] This Court has noted in *dicta* that a Rule 12(b)(6) motion to dismiss is inappropriate in a habeas corpus proceeding. *See Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 269 n.14 (1978). However, the overwhelming majority of courts have subsequently applied Rule 12(b)(6) when considering a motion to dismiss a habeas petition.

allegation[s]" that provide the "grounds on which the claim rests." (internal quotations omitted)), *with Mayle v. Felix*, 545 U.S. 644, 655 (2005) ("Notice pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." (quoting Advisory Committee's Notes on Habeas Corpus Rule 4, 28 U.S.C., p. 471) (internal quotations omitted)). Finally, under both rules, a complaint/petition must contain more than conclusions of law. *Compare Iqbal*, 129 S. Ct. at 1949 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" (quoting *Twombly*, 550 U.S. at 555)), *with Felix*, 545 U.S. at 655 (A habeas petition must contain more than "'mere conclusions of law, unsupported by any facts.'" (quoting Advisory Committee's Notes on Habeas Corpus Rule 2, 28 U.S.C., p. 469)). Because the pleading standards under Civil Rule 8 and Habeas Corpus Rule 2(c) are the same, this case indeed presents an ideal vehicle for reviewing the important circuit split identified in the petition for a writ of certiorari.

Respondent's assertion that Habeas Corpus Rule 2(c) requires a pleading standard higher than that required by Federal Rule of Civil Procedure 8 is erroneously based on a comparison between Habeas Corpus Rule 2(c) and the former Federal Rule of Civil Procedure 8 pleading standard as interpreted in *Conley v. Gibson*, 355 U.S. 41 (1957), which this Court explicitly overruled in *Twombly*. *See Twombly*, 550 U.S. at 561-63. Although it is true that this Court once stated that "Habeas

Corpus Rule 2(c) is more demanding" than Civil Rule 8, this Court was comparing Rule 2(c) to the requirement from *Conley* that "a complaint need only provide 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Felix*, 545 U.S. at 655 (quoting *Conley*, 355 U.S. at 47). Any past difference between the two standards has been erased by *Twombly* and *Iqbal* and should not impede this Court from granting Mr. Townes' petition for a writ of certiorari in this case.

Respondent also suggests that permitting a habeas petitioner to allege intentional discrimination under the pleading requirements of *Swierkiewicz* would inappropriately open the door to "automatic discovery" for habeas petitioners. (*See* Opp. 9.) First, this is a merits issue, which should not sway this Court with respect to the grant of a writ of certiorari. Second, this Court's precedents still would require a petitioner to state a plausible claim, which is no easy task. *See Iqbal*, 129 S. Ct. at 1950. Indeed, in *Swierkiewicz*, this Court noted that the plaintiff's complaint alleging employment discrimination "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." 534 U.S. at 514. Thus, a vague equal protection claim without supporting facts would fail to state a claim. By contrast, a petition that includes sufficient factual allegations of the non-intent elements of a discrimination claim would be permitted to go forward. This is exactly the case here, where Mr. Townes alleged that he is a black male; he was denied parole eligibility based on the

state's three-strikes law; a white, female prisoner was granted parole eligibility around the same time; and both cases involved three or four virtually identical robberies within a short time period. (*See* Supp. App. SA1-SA14.)

Because the pleading and dismissal standards under the civil and habeas rules are the same, the question of whether *Swierkiewicz* is still good law controls the outcome of this case, and, accordingly, a writ of certiorari is warranted. In *Swierkiewicz*, this Court held that, with respect to the intent element of a discrimination claim, a plaintiff need only allege that he or she was discriminated against on the basis of the plaintiff's membership in a protected class rather than allege specific facts supporting an intent to discriminate. *See Swierkiewicz*, 534 U.S. at 514. If *Swierkiewicz* remains good law after *Iqbal* and *Twombly*, the Fourth Circuit erred by affirming the dismissal of Mr. Townes' petition. If, on the other hand, *Iqbal* and *Twombly* require – contrary to *Swierkiewicz* – that a victim of discrimination plead facts demonstrating discriminatory intent, the Fourth Circuit's decision would have been proper. As previously discussed, the *Swierkiewicz* pleading standard is necessary to permit discrimination and equal protection claims to go forward because victims of discrimination rarely posses evidence of discriminatory intent beyond the facts of what actually happened. (*See* Pet. 23.) It is likewise significant for habeas petitioners, particularly those filing petitions *pro se*, to be permitted to allege discrimination without detailing specific facts regarding discriminatory intent.

II. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE PLEADING STANDARDS FOR INTENTIONAL DISCRIMINATION CASES.

Next, Respondent contends that the division in the circuits Petitioner has advanced is "purely abstract in character." (Opp. 13.) This is not a fair characterization of the state of decision in the courts of appeals. The Fourth Circuit's decision in this case is unmistakably in conflict with the decisions of at least four other circuit courts. (*See* Pet. 19-22.) Had Mr. Townes been able to file his habeas petition within the Second, Sixth, Seventh, or District of Columbia Circuits, the reviewing court would not have required that Mr. Townes allege additional evidence of discriminatory intent. *See Boykin v. KeyCorp*, 521 F.3d 202, 212-16 (2d Cir. 2008); *Ruffin v. Nicely*, 183 F. App'x 505, 513 (6th Cir. May 18, 2006); *Lindsay v. Yates*, 498 F.3d 434, 440 n.6 (6th Cir. 2007); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1082-85 (7th Cir. 2008); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008). For example, the Second Circuit in *Boykin* held that a discrimination complaint that "identified the particular events giving rise to [Boykin's] claim and alleged that [Boykin] was treated less favorably than other loan applicants because of her race [and] gender," without including any additional facts that would demonstrate discriminatory intent, should not be dismissed. *See Boykin*, 521 F.3d at 214-15. By holding that specific factual allegations of discriminatory intent are not required to survive a motion to dismiss, the Second Circuit's decision in

Boykin is clearly contrary to that of the Fourth Circuit below, which affirmed the dismissal of Mr. Townes' petition for exactly that deficiency.[2]

III. THIS CASE IS NOT MOOT.

The panel majority correctly held that this case is not moot. (*See* App. 4a-10a.) The majority carefully analyzed each of the requirements of Article III standing – (1) injury-in-fact, (2) causation, and (3) redressability – and explained that Mr. Townes had demonstrated that his action satisfied each of them. (*See id.*) First, the majority held that Mr. Townes asserted an injury-in-fact because he "could receive a shorter period of parole if he receives a discretionary parole hearing." (App. 5a.) Second, the majority held that Mr. Townes demonstrated causation because "the [Parole] Board's parole ineligibility finding precludes Townes from an opportunity to obtain a shortened period of parole." (App. 6a.) Finally, the majority held that Mr. Townes "alleged an injury that still satisfies the redressability prong." (App. 6a.)

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[2] Respondent also argues that the Third Circuit's express statement that *Swierkiewicz* has been "repudiated by both *Twombly* and *Iqbal*," *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009), is *dicta*. (Opp. 12-13.) Regardless of how the Third Circuit's clear denouncement of *Swierkiewicz* is characterized, Respondent cannot legitimately contend that the Fourth Circuit's decision below is not in conflict with the Second Circuit's decision in *Boykin* or the other circuit court decisions cited in the Petition. (*See* Pet. 19-22.) Accordingly, this case presents a concrete split among the circuits that this Court should address.

Rejecting the majority's conclusion, Respondent contends that this Court should not review a moot case. (Opp. 13-14.) Specifically, Respondent argues that Mr. Townes cannot satisfy the redressability prong because he cannot show that it is "likely" that a favorable decision in federal court will prompt the Virginia Parole Board to reduce his time on parole. (*Id.*) Respondent's argument mischaracterizes the law. As the majority explained, a party is not required to show that a favorable decision in federal court "likely would provide him the ultimate, discretionary relief sought from the agency." (App. 7a.) Instead, as this Court held in *FEC v. Akins*, " '[i]f a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action . . . even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason.' " (App. 7a (quoting *Akins*, 524 U.S. 11, 25 (1998)).) In such a case, the party challenging the agency action has standing unless the reviewing court " 'know[s]' " that the "agency will not grant the ultimate relief." (App. 8a (quoting *Akins*, 524 U.S. at 25).)

In this case, a favorable decision in federal court has the potential to provide Mr. Townes with the immediate relief he seeks: "a judgment that the state's parole-ineligibility determination was unconstitutional, necessitating a remand to the district court to order the Parole Board to rescind that determination." (*See* App. 9a-10a.) Respondent cites a passage from the Virginia Parole Board Policy Manual in an apparent effort to show that the Board will not consider Mr.

Townes' parole eligibility when deciding whether to grant relief. (Opp. 14.) But this argument lacks merit in light of Respondent's admission that "'[u]nder Virginia law, the Virginia Parole Board has absolute discretion in matters of parole.'" (*See* App. 10a (quoting Supp. Br. of Appellees at 9).) The Fourth Circuit correctly concluded that this discretion "belies any suggestion that the Board lacks power to provide Townes relief." (*See* App. 10a.) Therefore, this Court should not deny review based on Respondent's attempt to revive the argument that this case is moot.[3]

IV. THE STATE COURT DID NOT PROPERLY DISMISS MR. TOWNES' PETITION.

Mr. Townes alleged that he was similarly-situated to a white, female prisoner (Ms. Kennon) who, unlike Mr. Townes, was granted parole eligibility despite the state's three-strikes statute. (*See* Pet. 6-8.) Mr. Townes' habeas petition thus presented a classic equal protection claim. He specifically alleged that a white woman who was convicted of the same crimes over approximately the same time period was treated differently than himself, a black man, by the same governmental

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[3] As Mr. Townes and Respondent both recognize, there is a split in the circuits over whether a prisoner's release on parole moots a challenge to the legality of detention when the prisoner seeks a reduction of his term of supervised probation. *Compare Burkey v. Marberry*, 556 F.3d 142, 149-50 (3d Cir.), *cert. denied*, 130 S. Ct. 458 (2009), *with Levine v. Apker*, 455 F.3d 71, 76-77 (2d Cir. 2006), *and Mujahid v. Daniels*, 413 F.3d 991, 994-95 (9th Cir. 2005).

body. The facts of the two cases are simply striking in their similarity. Not only did Mr. Townes allege these facts, he included with his petition a newspaper article providing evidence of this disparate treatment. (*See* Supp. App. SA13-SA14.) This is thus a unique case, and if Mr. Townes' habeas petition does not state an equal protection claim, then many other plaintiffs and petitioners with potentially meritorious claims will see their complaints and petitions dismissed as well before they ever had any opportunity to explore intent, as is required by *Swierkiewicz*. Accordingly, it is critically important that this Court grant Mr. Townes' petition for a writ of certiorari to review this important split among the courts of appeals.

Respondent presents two arguments for why Mr. Townes' habeas petition was properly dismissed as "frivolous." (*See* Opp. 15-16.) First, Respondent improperly contests Mr. Townes' factual allegations by noting that Ms. Kennon used " 'a broken or a toy pistol' " during the robberies she committed whereas Mr. Townes used a real firearm. (*See* Opp. 15 (quoting Supp. App. SA14).) This argument, however, is irrelevant because it goes to the merits of the case and does not rebut the legal argument that Mr. Townes has alleged sufficient factual matter to state plausibly that he was similarly-situated to Ms. Kennon.

Second, Respondent inappropriately faults Mr. Townes, a *pro se* prisoner, for alleging that his treatment vis-à-vis Ms. Kennon "can be seen" as discrimination rather than alleging that the Parole Board "actually discriminated" against him. (*See*

Opp. 15-16.) As Petitioner has previously noted, this argument is flawed. (*See* Pet. 22 n.14.) "A document filed *pro se* is 'to be liberally construed,' . . . and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.' " *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Mr. Townes alleged that the Parole Board's treatment of two prisoners – a black male and a white female – "can be seen as deliberate discrimination" and "violates the equal protection of law as guaranteed by the 14th Amendment of the United States Constitution." (Supp. App. SA11.) Mr. Townes plainly was alleging — perhaps inartfully — that the Parole Board discriminated against him. Especially in light of the liberal pleading rules afforded to *pro se* petitioners, Mr. Townes' allegations were sufficient.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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